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Government Information and the Rights of Citizens

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PROJECT

GOVERNMENT INFORMATION AND THE RIGHTS OF CITIZENS

Mile after mile, acre after acre, in metal cabinets and on computer tapes, the confidential files of Uncle Sam grow steadily and, some say, ominously. Who knows what they contain?

WALL STREET JOURNAL,
JUNE 27, 1975, AT 1, COL. 1
(MIDWEST ED.)

I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hall-mark of all truly effective internal security systems would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.

NEW YORK TIMES v. UNITED STATES,
403 U.S. 713, 729 (1971) (STEWART &
WHITE, JJ., CONCURRING)

As we press forward, better to secure individual privacy protection, the sirens of simplistic solutions will continue to beckon us. Our challenge remains, therefore, the hard one of striking a fair balance between competing interests. And the thoughtful public servant rarely has the luxury of balancing good and evil. Most often the competing interests confronting him are one good versus another good.

ADDRESS BY DOUGLAS W. METZ,
FEDERAL BAR ASSOCIATION CONFERENCE,
MAY 22, 1975

Few aspects of government-citizen relations are more central to the responsible operation of a representative democracy than the citizen's ability to monitor governmental operations. Critical in this regard is the existence of a general individual right of access to government-held information. Concurrently, the psychological well-being of a citizenry depends upon governmental recognition of individual privacy interests. In the process of acquiring, utilizing, and disseminating personal, identifying information, a government unresponsive to individual privacy necessarily chills the development of a creative and individualistic citizenry and stifles or embitters regenerative governmental criticism.

This Project delineates the federal and state responses to these two fundamental societal concerns. The course of the discussion suggests the vitality of these concerns, and the flexibility and continuing development of the governmental responses. Clearly, the interests in maximizing disclosure of government-held information and minimizing the handling and dissemination of unnecessary or inaccurate personal information can conflict. The contours of this conflict, only intimated herein, will doubtless become more bold with the maturation of the opposing statutory schemes.

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I. ACCESS TO GOVERNMENT INFORMATION

A. *The Classification System*

One of the most effective ways in which the federal government limits public access to information is through its classification system. When a government agency classifies a document, it is restricted, for at least a certain period of time, to persons "determined to be trustworthy," for whom "access . . . is necessary for the performance

of [their] duties."¹ To the extent that the information is not otherwise available, everyone else must do without it. The amount of information withheld from the public by the classification system is substantial: Between April 1, 1973, and December 31, 1973, well over 4 million documents were classified by various agencies of the United States Government.²

The executive branch's rationale for establishing a classification system is that

[W]ithin the Federal Government there is some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints for the security of our Nation and the safety of our people and our allies. To protect against actions hostile to the United States, of both an overt and covert nature, it is essential that such official information and material be given only limited dissemination.³

Without challenging the legitimacy of this position, it is still necessary to question whether the current classification system goes too far: In the words of Senator Edmund Muskie, "The system of secrecy that has flourished in the executive branch since 1940 has not only denied the Congress the information it requires to make effective judgments of policy, it has also withheld from the people the knowledge of the Government's behavior that is essential to popular understanding and democratic consensus."⁴

This section of the Project will attempt to explain why the classification system is subject to such serious criticism. The formal structure of the system and the practical problems that arise under the current approach to classification will be discussed. The legal theory underlying the system will be closely examined. Finally, some proposed revisions of the system will be considered, and alternative solutions to the problems raised by these proposals will be suggested.

1. *The Framework of the Current System*

Since the Revolutionary War, the federal government has recognized that certain government-held information needs "special

1. Exec. Order No. 11652 § 6(A), 3 C.F.R. 346 (1974).

2. INTERAGENCY CLASSIFICATION REVIEW COMMITTEE, PROGRESS REPORT: IMPLEMENTATION OF EXECUTIVE ORDER 11652 ON CLASSIFICATION AND DECLASSIFICATION OF NATIONAL SECURITY INFORMATION AND MATERIAL 23 (1974) [hereinafter ICRC REPORT]. The total of 4,106,321 does not include Defense Department figures for April, May, and December.

3. Exec. Order No. 11652, preamble, 3 C.F.R. 339 (1974).

4. *Government Secrecy, Hearings on S. 1520, S. 1726, S. 2451, S. 2738, S. 3393, and S. 3399 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 93d Cong., 2d Sess. 1 (1974) [hereinafter *Government Secrecy Hearings*].

treatment"; no formal system of information control was adopted before this century, however.⁵ Until the end of World War II, the federal classification system covered only military secrets, and only the military departments had classification authority.⁶ An executive order issued by President Truman⁷ first authorized all federal non-military agencies to limit access to national security information. Because the system established by the Truman order was subject to considerable criticism, it was subsequently altered by President Eisenhower,⁸ and was again modified by President Kennedy.⁹ The classification issue most recently gained prominence in 1971, in connection with the Pentagon Papers controversy.¹⁰ President Nixon at that time ordered another review of the security classification system.¹¹ This review led to the promulgation in March 1972 of the executive order that established the current classification system.¹²

The first point to be made about the current system is that it rests on an inverted pyramid of entirely nonstatutory authority. The narrow base is Executive Order 11652 (the E.O.),¹³ effective since June 1, 1972. A National Security Council directive of May 17, 1972¹⁴ (the Directive), elaborates on the E.O. by prescribing procedures for achieving its objectives. Finally, the broad top of the pyramid is composed of regulations issued by the various agencies of the executive branch that have been given the authority to classify.¹⁵ These regulations provide operational guidance to persons actually exercising classification authority. Thus, an analysis of the

5. SENATE COMM. ON FOREIGN RELATIONS, 92d CONG., 1st SESS., *SECURITY CLASSIFICATION AS A PROBLEM IN THE CONGRESSIONAL ROLE IN FOREIGN POLICY* 3 (Comm. Print 1971) [hereinafter *SECURITY CLASSIFICATION*].

6. *Id.* at 8-9. For more detailed discussions of the history of the security classification system, see C. BARKER & M. FOX, *CLASSIFIED FILES: THE YELLOWING PAGES* (1972); J. WIGGINS, *FREEDOM OR SECRECY* (1964).

7. Exec. Order No. 10290, 3 C.F.R. 789 (1949-53 Comp.).

8. Exec. Order No. 10501, 3 C.F.R. 979 (1949-53 Comp.).

9. Exec. Order No. 10964, 3 C.F.R. 486 (1959-63 Comp.). The major modification introduced by this order was a provision for limited use of automatic declassification, that is, the termination of classified status merely upon the passage of time.

10. *SECURITY CLASSIFICATION*, *supra* note 5, at 32. In the period between the Kennedy Administration and the Pentagon Papers affair, as mistrust of the government grew in response to United States involvement in Vietnam, many people became convinced that classification was in fact being used as a political tool. See C. BARKER & M. FOX, *supra* note 6, at 3-4.

11. *SECURITY CLASSIFICATION*, *supra* note 5, at 34.

12. Exec. Order No. 11652, 3 C.F.R. 339 (1974). See *SECURITY CLASSIFICATION*, *supra* note 5, at 31.

13. 3 C.F.R. 339 (1974).

14. *National Security Council Directive Governing the Classification, Downgrading, Declassification and Safeguarding of National Security Information*, 3A C.F.R. 227 (1972) [hereinafter *NSC Directive*].

15. The regulations governing classification for the State Department (including the United States Information Agency and the Agency for International Development),

current classification system requires an examination of the implementing Directive and the departmental regulations, as well as of the E.O. itself.

a. *Administration of the system.* While the National Security Council (NSC) is ultimately responsible for monitoring the implementation of the system, the E.O. provides for the establishment of an Interagency Classification Review Committee (ICRC) to assist in this task.¹⁶ The E.O. requires that the ICRC meet regularly and take action to ensure compliance with the E.O.; in particular, its functions are to oversee agency actions and to establish procedures enabling it to receive, consider and act upon suggestions or complaints from government employees or members of the public. The E.O. expressly provides that all agencies shall furnish the ICRC with any particular information or material that it needs.¹⁷

The Directive does not restrict the scope of action of the ICRC; it provides only that the ICRC "shall . . . take such actions as are deemed necessary to insure uniform compliance with the Order and this Directive."¹⁸ Most important, the Directive makes explicit the ICRC's jurisdiction to hear appeals from denials of requests for classified information.¹⁹

In addition to establishing the ICRC, the E.O. delegates to the agencies administrative responsibility for implementing the classification program. Each agency is required to develop regulations to this effect, subject to the approval of the ICRC.²⁰ Each agency head must appoint "a senior member of his staff" to oversee this process and to chair an agency committee authorized to act on all suggestions and complaints regarding the agency's administration of the E.O.²¹

Justice Department, Defense Department, the Central Intelligence Agency, and the National Archives and Records Services are collected at 37 Fed. Reg. 15624 (1972). (This collection also includes the regulations of the now defunct Atomic Energy Commission, abolished by Act of Oct. 11, 1974, Pub. L. No. 93-438, 88 Stat. 1233.) Because these agencies together generate over 95 per cent of the classified materials produced by the federal government, see ICRC REPORT, *supra* note 2, at 23, the discussion will focus on their regulations.

16. The ICRC as originally established was composed of representatives of the Departments of State, Defense, and Justice, the Atomic Energy Commission, the CIA and the National Security Council, with a chairman to be designated by the President. Exec. Order No. 11652 § 7(A), 37 Fed. Reg. 5209 (1972). The Archivist of the United States was later added to the Committee. Exec. Order No. 11714, 38 Fed. Reg. 10245 (1973).

17. Exec. Order No. 11652 § 7(A), 3 C.F.R. 347 (1974).

18. NSC Directive, *supra* note 14, § IXB, 3A C.F.R. 239 (1972). The ICRC chairman is authorized to appoint an executive director and to maintain a permanent staff.

19. NSC Directive, *supra* note 14, § IXD, 3A C.F.R. 239 (1972).

20. Exec. Order No. 11652 § 7(B)(1), 3 C.F.R. 347 (1974).

21. Exec. Order No. 11652 § 7(B)(2), 3 C.F.R. 348 (1974).

b. *Scope of classification.* The stated purpose of the E.O. is to identify information that must be protected "because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations" ²² The E.O. provides that material requiring this protection shall be classified as Top Secret, Secret, or Confidential, and that no other categories are to be used, except as provided by statute. ²³

According to the E.O., a Top Secret classification is appropriate only when unauthorized disclosure of the information in question "could reasonably be expected to cause exceptionally grave damage to the national security." ²⁴ Examples of "exceptionally grave damage" include armed hostilities against the United States or her allies, disruption of foreign relations vitally affecting the national security, compromise of vital defense plans or complex cryptologic intelligence systems, revelation of sensitive intelligence operations, and the disclosure of vital scientific or technical developments. ²⁵

Information merits a Secret classification if its unauthorized disclosure "could reasonably be expected to cause serious damage to the national security." ²⁶ The examples given are similar to those set out for Top Secret, except that this classification applies to "significant" rather than "vital" matters. ²⁷

Information that merits a Confidential rating is such that its unauthorized disclosure "could reasonably be expected to cause damage to the national security." ²⁸ No examples are provided.

After setting out the above guidelines, the E.O. establishes the policy that "unnecessary classification and over-classification shall be avoided." Classification is to be based solely on national security considerations; classifying to conceal inefficiency or to avoid embarrassment is expressly enjoined. ²⁹ The Directive, in a similar spirit, provides that the least restrictive classification is to be used when there is uncertainty about the proper treatment of information. ³⁰

This relatively straightforward system is complicated somewhat by the implementing regulations adopted by some executive agencies. For example, the Department of State has established a category of "administratively controlled information" described as pertaining to material that, though it is "not national security material and,

22. Exec. Order No. 11652, preamble, 3 C.F.R. 339 (1974).

23. Exec. Order No. 11652 § 1, 3 C.F.R. 339-40 (1974).

24. Exec. Order No. 11652 § 1(A), 3 C.F.R. 340 (1974).

25. Exec. Order No. 11652 § 1(A), 3 C.F.R. 340 (1974).

26. Exec. Order No. 11652 § 1(B), 3 C.F.R. 340 (1974).

27. Exec. Order No. 11652 § 1(B), 3 C.F.R. 340 (1974).

28. Exec. Order No. 11652 § 1(C), 3 C.F.R. 340 (1974).

29. Exec. Order No. 11652 § 4, 3 C.F.R. 342-43 (1974).

30. NSC Directive, *supra* note 14, § IE, 3A C.F.R. 228 (1972).

therefore, cannot be classified, is nonetheless protected by law against disclosure."³¹ This category covers personal and personnel information and information from "privileged sources."³² It is to be marked "Limited Official Use" and "handled, transmitted, and stored as if it were 'Confidential.'"³³

The Department of Defense regulations repeat verbatim the E.O. definitions of Top Secret, Secret, and Confidential.³⁴ However, another regulation, apparently designed to explain further these categories, states that properly classifiable information includes information "which is truly essential to national security because it provides the United States with: 1) A military or defense advantage over any foreign nation or group of nations, or 2) a favorable foreign relations posture, or 3) a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert; which could be damaged, minimized or lost by the unauthorized disclosure or use of the information."³⁵ A third set of classification criteria appears in another section of the Defense Department regulations.³⁶ This last group is the most detailed, and a classifier is required to consider each criterion before deciding to apply a classification.³⁷ Under these criteria, a document is to be classified either because the information it contains is sensitive, or because, if it is read with other documents, including those in the public domain, sensitive information will be revealed.³⁸ Public need for information does not appear as a classification criterion in any of these regulations.

c. *Distribution of classification authority.* The E.O. deals explicitly with the problem of distributing classification authority.

31. 22 C.F.R. § 9.28 (1974).

33. 22 C.F.R. § 9.28(a) (1974).

33. 22 C.F.R. § 9.28(a) (1974).

34. 32 C.F.R. §§ 159.104-1 to -3 (1974).

35. 32 C.F.R. § 159.103(a)(1) (1974).

36. 32 C.F.R. §§ 159.202 to .202-15 (1974).

37. 32 C.F.R. § 159.202 (1974). The regulation provides that certain specific considerations be taken into account before reaching a classification decision. For example, according to the regulation a document should be classified if the information it contains provides the United States with a "scientific, engineering, technical, operational, intelligence, strategic or tactical advantage directly related to national security." 32 C.F.R. § 159.202-3(a) (1974). A document also must be classified if its disclosure "would weaken the ability of the United States to wage war or defend itself successfully, limit the effectiveness of the armed forces, or make the United States vulnerable to attack." 32 C.F.R. § 159.202-3(c) (1974). Additionally, there is a requirement that information should not be classified unless its unauthorized disclosure could reasonably be expected to result in harm to the national security. 32 C.F.R. § 159.202-3 (1974). The degree of intended use, possible scientific and technical advantage to be derived from unclassified use, lead-time advantage, and the physical cost of classifying are all to be considered. 32 C.F.R. §§ 159.202-4 to -7 (1974).

38. 32 C.F.R. § 159.202-2 (1974).

It gives Top Secret authority to thirteen agencies;³⁹ within them, classification authority rests with the agency head, such of his senior principal deputies and assistants as he designates in writing, and such heads of agency subdivisions and their deputies and assistants, as the agency head designates in writing.⁴⁰ Persons with Top Secret authority also have Secret authority. In addition, the heads of thirteen other agencies and such senior principal deputies or assistants as they designate in writing may classify information as Secret.⁴¹ Confidential authority is given to all of the above officials.⁴² The E.O. expressly forbids agencies outside these two groups from classifying information.⁴³

The Directive underlines these restrictions, emphasizing that classification authority may be exercised only by persons specified in the E.O., and that such officials may not delegate their authority.⁴⁴ It further requires all agencies to maintain lists of persons authorized to classify information.⁴⁵

Agency regulations tend to depart from the restrictive delegation policy outlined in the E.O. and in the Directive. The Department of State regulations, for example, provide that any person who prepares a potentially classifiable document must assign a classification to it at that time; officials with appropriate classifying authority are thus restricted to giving final approval to these tentative classifications.⁴⁶ These latter officials are ultimately responsible for the propriety of the classifications they have approved, however.⁴⁷

The Defense Department regulations also provide for this tentative classification procedure, although under these regulations the initial classifier must "maintain a record to show the basis for clas-

39. These are such offices in the Executive Office of the President as the President may designate in writing, CIA, Atomic Energy Commission, Department of State, Department of the Treasury, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, United States Arms Control and Disarmament Agency, Department of Justice, NASA, and Agency for International Development. Exec. Order No. 11652 § 2(A), 3 C.F.R. 340-41 (1974).

40. Exec. Order No. 11652 § 2(A), 3 C.F.R. 340-41 (1974).

41. These agencies are Department of Transportation, FCC, Export-Import Bank of the United States, Department of Commerce, United States Civil Service Commission, United States Information Agency, General Services Administration, Department of Health, Education, and Welfare, Civil Aeronautics Board, Federal Maritime Commission, Federal Power Commission, National Science Foundation, and Overseas Private Investment Corporation. Exec. Order No. 11652 § 2(B), 3 C.F.R. 341 (1974).

42. Exec. Order No. 11652 § 2(C), 3 C.F.R. 342 (1974).

43. Exec. Order No. 11652 § 2(D), 3 C.F.R. 342 (1974). As a check on possible abuse of classification authority, the E.O. requires classified information to bear on its face some form of identification of the person who classified it. Exec. Order No. 11652 § 4(B), 3 C.F.R. 343 (1974).

44. NSC Directive, *supra* note 14, § IA, 3A C.F.R. 227 (1972).

45. NSC Directive, *supra* note 14, § ID, 3A C.F.R. 227-28 (1972).

46. 22 C.F.R. § 9.7(a) (1974).

47. 22 C.F.R. § 9.7(b) (1974).

sification"⁴⁸ Accountability is carried further here than under the State Department regulations; all officials to or through whom classified material passes are jointly responsible with the original classifier for the classification assigned.⁴⁹

d. *Access to classified information.* Access to classified information is governed generally by section 6(A) of the E.O.: "No person shall be given access to classified information or material unless such person has been determined to be trustworthy and unless access to such information is necessary for the performance of his duties."⁵⁰ Section 9 permits agencies to impose, "in conformity with the provisions of this order, special requirements with respect to access, distribution and protection of classified information"⁵¹

The Directive requires that an agency obtain "the specific prior approval of the head of a Department or his designee,"⁵² before promulgating a rule under section 9. The Directive also states that classified information may not be "disseminated in any manner outside authorized channels" without the consent of the agency that originally classified it.⁵³

The various agencies affected by the E.O. have promulgated regulations under section 9. The Department of State, for example, has established four dissemination control designations: (1) nodis (no distribution): "no distribution to other than the addressee without the approval of the Executive Secretary" of the Department. This designation is to be used "only on messages of the highest sensitivity between the President, the Secretary of State, and chiefs of mission";⁵⁴ (2) exdis (exclusive distribution): distribution exclusively to officers "with essential need to know." "[O]nly highly sen-

48. 32 C.F.R. § 159.200 (1974).

49. 32 C.F.R. § 159.200-1(b) (1974).

50. Exec. Order No. 11652 § 6(A), 3 C.F.R. 346 (1974). Section 12 establishes an exception to section 6(A), rendering it inapplicable "to persons outside the executive branch who are engaged in historical research or who have previously occupied policy-making positions to which they were appointed by the President," upon the determination by the head of the agency that originated the classified information that access "is clearly consistent with the interests of national security" and his ensuring that the information sought will not be "published or otherwise compromised." Exec. Order No. 11652 § 12, 3 C.F.R. 349 (1974).

According to the Directive, access for researchers under section 12 of the E.O. is limited to information that can be "located and compiled with a reasonable amount of effort"; furthermore, the researcher must agree to safeguard the information and to permit "a review of his notes and manuscript for the sole purpose of determining that no classified information or material is contained therein." *NSC Directive, supra* note 14, § VIB, 3A C.F.R. 236-37 (1972). Access for former presidential appointees not covered by section 12 of the E.O. "may be authorized," according to the Directive. *NSC Directive, supra* note 14, § VIC, 3A C.F.R. 237 (1972).

51. Exec. Order No. 11652 § 9, 3 C.F.R. 348 (1974).

52. *NSC Directive, supra* note 14, § VIF, 3A C.F.R. 237 (1972).

53. *NSC Directive, supra* note 14, § VIE, 3A C.F.R. 237 (1972).

54. 22 C.F.R. § 9.34(b)(1) (1974).

sitive traffic between the White House, the Secretary, the Under Secretaries and chiefs of mission" is to be so marked;⁵⁵ (3) *limdis* (limited distribution): distribution strictly limited to recipients with need to know, to be applied only to messages of more than usual sensitivity;⁵⁶ (4) No Distribution Outside Department: precludes distribution to other federal agencies. This designation is to be used when disclosure to such agencies "would be prejudicial to the best interests of the Department of State" and may be used along with *exdis* and *limdis*.⁵⁷

State Department regulations also establish guidelines for disseminating information to persons outside the executive branch.⁵⁸ Classified information will generally not be released to such persons.⁵⁹ However, this information will be released to Congress upon the approval of the Office of Congressional Relations and the Office of Security.⁶⁰ The General Accounting Office (GAO), the nonexecutive branch agency that oversees federal expenditures for the Congress, can usually obtain access to the classified information it requests, but specific State Department approval is necessary in some situations.⁶¹

The Defense Department regulations do not list the special access rules that have been established under section 9 of the E.O. They do state that it is the general policy of the Department to adhere to the access rule outlined in the E.O.; however, procedures for establishing special rules when necessary are given.⁶² Classified information held by the Defense Department will be released to persons or agencies outside the executive branch if this is necessary for the

55. 22 C.F.R. § 9.34(b)(2) (1974).

56. 22 C.F.R. § 9.34(b)(3) (1974).

57. 22 C.F.R. § 9.34(b)(4) (1974).

58. The State Department's regulations dealing with access for researchers and ex-appointees duplicate in substance those of the E.O. and the Directive. 22 C.F.R. §§ 9.22, 9.25 (1974). See note 50 *supra*.

59. 22 C.F.R. § 9.23(b) (1974).

60. 22 C.F.R. § 9.23(a) (1974).

61. Such approval is required when, in the opinion of the chief of mission or bureau head from whom a document is sought, the document: (1) would, if released, "seriously impair relations between the United States and other countries in the conduct of foreign affairs, or otherwise prejudice the best interests of the United States"; (2) is "directed to the President, the National Security Council, or a similar White House Board"; (3) relates "to formulation of sensitive substantive policy (as distinguished from a statement of or implementation of policy)"; (4) is of a generally restricted character, such as personnel records, or material originated by another agency. *Hearings on U.S. Government Information Policies and Practices Before the Subcomm. on Foreign Operations and Government Information of the House Comm. on Government Operations*, 92d Cong., 1st Sess. 50 (1971) (reprinting a GAO report) [hereinafter *Government Information Hearings*].

62. These procedures involve obtaining permission from either the secretary of the service department involved or the Secretary of Defense. 32 C.F.R. §§ 159.1200 to -3 (1974).

"performance of a function from which the Government will derive a benefit or advantage," and if the particular department that first classified the information does not object to its dissemination.⁶³

The Department of Defense regulation governing congressional access to classified material basically requires the Department to furnish the information that Congress requests. If the information asked for is considered to be too sensitive to leave the executive branch, an alternative means of meeting the request is sought. If Congress rejects an alternative suggested by the Department, final refusal to release the information must be expressly approved by the head of the Defense Department unit concerned. If a congressionally suggested alternative to release of the information is unacceptable to the Department, only the President, under a formal claim of executive privilege, may refuse the request.⁶⁴

Department of Defense regulations expressly limit the GAO's access to classified information. The governing regulation provides that budgets for future programs, non-Department of Defense reports, and investigative reports are not to be released to the GAO.⁶⁵ Certain units within the Defense Department have adopted even more restrictive regulations; for example, the European Command Headquarters denies the GAO access to most documents related to war plans.⁶⁶

e. *Declassification.* The current E.O. pays careful attention to the problem of declassification. It establishes a General Declassification Schedule, according to which classified documents are automatically downgraded and eventually declassified at fixed time intervals.⁶⁷ This system does not apply to all classified information, however. Because "[c]ertain classified information or material may warrant some degree of protection for a period exceeding that pro-

63. 32 C.F.R. § 159.700-6 (1974). Access rules for historical researchers and former presidential appointees do not differ substantially from those set out in the E.O. and the Directive. See note 50 *supra*. The only noteworthy addition is that members of the White House staff and presidential special committees or commissions are excluded from the category of former presidential appointees. 32 C.F.R. § 159.700-6(f) (1974).

64. *Government Information Hearings*, *supra* note 61, at 3156 (*quoting* Department of Defense Directive No. 5400.4). For a discussion of executive privilege, see text at notes 262-307 *infra*.

65. *Government Information Hearings*, *supra* note 61, at 3049 (*citing* Department of Defense Directive No. 7650.1). This directive is mentioned in 32 C.F.R. § 159.700-6(c) (1974) as setting forth procedures for granting access to Defense Department classified information to representatives of the GAO.

66. *Government Information Hearings*, *supra* note 61, at 3049 (*citing* Department of Defense Directive No. 7650.1).

67. Top Secret documents are lowered to Secret at the end of the second full year following the year in which they were originally classified, reduced to Confidential two years after that, and declassified after the passage of six more years. Secret documents are downgraded to Confidential after two years and declassified after another six, while Confidential material is declassified at the end of the sixth year following the year of classification. Exec. Order No. 11652 § 5(A), 3 C.F.R. 344 (1974).

vided in the General Declassification Schedule," the E.O. provides that officials with Top Secret classification authority may exempt items from the operation of the General Declassification Schedule if they fall within one of the following four categories: (1) material furnished the United States by foreign governments or international organizations "on the understanding that it be kept in confidence"; (2) "material specifically covered by statute, or pertaining to intelligence sources and methods"; (3) material "disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security"; (4) material that, if disclosed, "would place a person in immediate jeopardy."⁶⁸ A classifier applying the exemption must, if possible, set a declassification date or indicate an event that will trigger declassification.⁶⁹

The E.O. requires that exemptions "be kept to the absolute minimum consistent with national security requirements"⁷⁰ It further provides that information should generally be declassified within thirty years from the date of classification.⁷¹

68. Exec. Order No. 11652 § 5(B), 3 C.F.R. 344 (1974). Another major exclusion from the General Declassification Schedule involves material classified under the executive order in effect prior to the issuance of the current E.O. Material classified under this earlier order was placed in one of four downgrading categories, only one of which culminated in automatic declassification. Exec. Order No. 10964 § 1(B), 3 C.F.R. 487 (1959-63 Comp.). The E.O. brings only this fourth category under the General Declassification Schedule. Exec. Order No. 11652 § 5(D), 3 C.F.R. 345 (1974). Material within the other three categories is subject, as is material classified under the current E.O., to the mandatory review requirements discussed below. *See* text at notes 78-91 *infra*.

69. Exec. Order No. 11652 § 5(B), 3 C.F.R. 344 (1974).

70. Exec. Order No. 11652 § 5(B), 3 C.F.R. 344 (1974).

71. Exec. Order No. 11652 § 5(E), 3 C.F.R. 345-46 (1974). For documents classified after the effective date of the current E.O., such declassification is automatic unless the head of the originating agency certifies in writing at the time of scheduled declassification that continued protection is essential to national security or that disclosure would place a person in immediate jeopardy. Such a determination must be accompanied by a specification of the period of continued classification. Exec. Order No. 11652 § 5(E)(1), 3 C.F.R. 345-46 (1974). Thirty-year-old documents classified prior to the effective date of the E.O. are subject to the same procedure, except that the declassification is carried out by the Archivist of the United States. Exec. Order No. 11652 § 5(E)(2), 3 C.F.R. 346 (1974).

Whether or not the E.O.'s system has increased the accessibility of such information, it appears to have speeded up considerably the declassification of information generated and classified some time ago. The National Archives is in the process of reviewing all "permanently valuable records" at least 30 years' old for the purpose of declassification. ICRC REPORT, *supra* note 2, at 25. To date, 162 million pages of such documents have been surveyed to identify files for bulk declassification and over 22 million pages of old documents have been declassified in bulk. An additional 27 million pages of documents have been declassified following a page by page review. Moreover, 835 thousand pages of documents in the Roosevelt, Truman, Eisenhower, and Kennedy libraries have been reviewed, 80 per cent of which were 30 years old or older; of these, 300 thousand pages have been declassified. *Id.*

Other government agencies also have been working to declassify older records. The Army, Navy, Air Force, Office of the Joint Chiefs of Staff, and CIA have all provided personnel to assist the Archives in its effort, and appear to have made progress in

The Directive interprets the E.O.'s declassification scheme. It states initially that material must be declassified once it no longer fits within one of the classification categories described in section 1 of the E.O.⁷² It next provides that the General Declassification Schedule should be used if an earlier declassification date cannot be determined.⁷³ Finally, the Directive requires each agency to conduct an annual review of its classified material to determine whether any of it is "of sufficient historical or other value to warrant preservation . . ."⁷⁴ All such material that is to become declassified during the year must be segregated, and made available to the public promptly at the end of the year.⁷⁵

Because the E.O. and the Directive have outlined the declassification scheme so precisely, there has been little need for agency elaboration. The only point at which agency regulations in this area seem to depart from the spirit of the E.O. and the Directive is in their attitude toward the use of exemptions. Specifically, the Directive provides that if a document is inadvertently not exempted from the General Declassification Schedule, it is to be considered subject to the Schedule.⁷⁶ However, State and Defense Department regulations provide that if the classifier inadvertently fails to exempt a document, the recipient shall either exempt it himself or return it to the originator.⁷⁷

Any potential for abuse of the declassification scheme through the use of exemptions is mitigated to some extent by the E.O.'s mandatory review provision.⁷⁸ This section provides that any material

reviewing pre-1946 materials. *Id.* at 26. For example, the CIA has reviewed approximately 1,000 cubic feet of Office of Strategic Services documents in the possession of the Archives, and has declassified 90 per cent of them. *Government Secrecy Hearings*, *supra* note 4, at 106 (testimony of J. Warner, General Counsel, Central Intelligence Agency). Other agencies have their own review programs. The Atomic Energy Commission, which began its review in 1971, had reviewed 2.2 million documents and declassified 1.2 million of them by April 1974. ICRC REPORT, *supra*, at 27. The Department of Defense has acted to declassify certain items of electronic equipment and to convince NATO to adopt a system of classification similar to that of the E.O. *Government Secrecy Hearings*, *supra*, at 234 (addendum to statement of D. Cooke, Assistant Secretary for Administration, Department of Defense). It has also reduced its inventory of top secret documents by 25 per cent, though this has involved more destruction of documents than declassification. *Id.* at 235. The National Aeronautics and Space Administration in 1973 declassified some 2,000 documents. ICRC REPORT, *supra*, at 29. The Department of State declassified in bulk 890,000 pages of documents dated 1947. *Id.*

72. NSC Directive, *supra* note 14, § IIA, 3A C.F.R. 228 (1972).

73. NSC Directive, *supra* note 14, § IIA, 3A C.F.R. 228 (1972).

74. NSC Directive, *supra* note 14, § IIIA, 3A C.F.R. 229-30 (1972).

75. NSC Directive, *supra* note 14, § IIIA, 3A C.F.R. 229-30 (1972). The National Archives has similar responsibilities regarding material in its custody. NSC Directive, *supra*, § IIID, 3A C.F.R. 231 (1972).

76. NSC Directive, *supra* note 14, § IVA, 3A C.F.R. 232-33 (1972).

77. 22 C.F.R. § 9.16(b) (1974) (Department of State); 32 C.F.R. § 159.403-1(d) (1974) (Department of Defense).

78. Exec. Order No. 11652 § 5(C), 3 C.F.R. 345 (1974).

exempted from the General Declassification Schedule is subject to review by the originating department ten years from the date of origin.⁷⁹ There are, however, three prerequisites to such review: (1) A member of the public or another government agency must request the review;⁸⁰ (2) the request must describe the material to be reviewed with sufficient particularity to enable the originating unit to identify it; (3) the material must be reasonably easy to find.⁸¹

The Directive delineates "request for review" procedures. It provides for initial processing of requests⁸² and gives the person asking for review the right to appeal if there is no decision on the request after sixty days. The appeal initially is heard by an agency classification committee.⁸³ The agency unit denying the initial request

79. Exec. Order No. 11652 § 5(C), 3 C.F.R. 345 (1974).

80. It is not clear what happens when a request is received for information that is less than ten years old. The mandatory review provisions are directed only at material that is both exempted from the operation of the General Declassification Schedule and more than ten years old. Review of material less than ten years old, exempted or not, is not discussed.

Some agency regulations do address this problem. Those of the Atomic Energy Commission, for example, provide that the Commission will respond "as promptly as available resources permit" to questions about classified materials less than ten years old. 10 C.F.R., pt. 9, app. A, § 6 (1974). Although not required to do so by its regulations, the Department of State has in practice adopted the policy of reviewing all requests, whether or not the documents in question are more than ten years old. *Government Secrecy Hearings*, *supra* note 4, at 167 (testimony of Ambassador C. Laise, Assistant Secretary of State for Public Affairs, Department of State). The CIA specifically permits classification review of documents "which . . . are more than ten (10) years old." 32 C.F.R. § 1900.5(b) (1974). By implication, requests for documents more recently classified will not be considered. The Department of Defense has no regulation on this subject, and its attitude toward requests for documents not yet ten years old is unclear.

Requests for review of documents more than 30 years old are referred directly to the Archivist of the United States. If custody of the documents has been transferred to the Archives, the Archivist alone is charged with reviewing the documents. If the originating agency retains custody, the Archivist conducts his review in conjunction with the agency head. In either case, the documents are to be declassified unless the agency head certifies in writing that continued protection is essential. *NSC Directive*, *supra* note 14, § IIID, 3A C.F.R. 231 (1972).

81. Exec. Order No. 11652 §§ 5(C)(1)-(3), 3 C.F.R. 345 (1974).

82. *NSC Directive*, *supra* note 14, § IIIB, 3A C.F.R. 230 (1972). Each agency is required to designate a particular office to which mandatory review requests may be directed. This office then forwards such requests to the appropriate agency unit for consideration. The receiving office or the agency unit must acknowledge receipt of the request in writing immediately and notify the requester of any fees that must be paid. The agency unit must either render a decision on the request within 30 days or explain why further time is necessary.

83. *NSC Directive*, *supra* note 14, § IIIB, 3A C.F.R. 230 (1972). The E.O. requires that each agency establish a classification committee to oversee agency declassification procedures. Exec. Order No. 11652 § 7(B)(2), 3 C.F.R. 348 (1974). In addition to hearing appeals from unit denials of declassification requests, these committees also review requests that have not been acted on by the appropriate agency unit. *NSC Directive*, *supra*, § IIIB, 3A C.F.R. 230 (1972), review denials of requests made under section 552(b)(1) of the Freedom of Information Act, *NSC Directive*, *supra*, § XB, 3A C.F.R. 240 (1972), prepare quarterly reports for the ICRC on classification review requests,

must, if possible, explain briefly why the material cannot be declassified⁸⁴ and, throughout the review process, bears the burden of showing that continued protection of the material is warranted.⁸⁵ If the agency cannot carry this burden, the material requested is made available unless it is exempted from disclosure by statute.⁸⁶

The ICRC has jurisdiction to hear appeals from denials by agency committees of requests for declassification.⁸⁷ An appeal is accepted if, "in the discretion of the Committee, the appeal raises substantive issues."⁸⁸ Denials that are based on a lack of particularity of description in the request or on difficulty of location are not subject to review.⁸⁹ Again, the agency bears "the burden of persuasion."⁹⁰ A majority vote of a quorum of the Committee is needed to declassify a document.⁹¹

f. *Sanctions.* The E.O. provides sanctions for violations of its provisions. It requires that persons who classify material unnecessarily must be notified that their actions violate the E.O., and it states that "repeated abuse of the classification process shall be grounds for an administrative reprimand."⁹² The agency committees and the ICRC are required to report such violations to the head of the agency unit concerned "so that corrective steps may be taken."⁹³

classification abuses, and unauthorized disclosures, *NSC Directive, supra*, § XC(2), 3A C.F.R. 240 (1972), and recommend to the agency head "appropriate administrative actions to correct abuse or violation" of the E.O. *NSC Directive, supra*, § XD, 3A C.F.R. 240 (1972).

84. *NSC Directive, supra* note 14, § IIIB, 3A C.F.R. 230 (1972).

85. *NSC Directive, supra* note 14, § IIIE, 3A C.F.R. 231-32 (1972).

86. *NSC Directive, supra* note 14, § IIIF, 3A C.F.R. 227, 231 (1972). *Cf.* text at notes 568-610 *infra*. If material is not properly classified, it cannot be withheld under the national security exemption of the FOIA. *See* text at notes 506-35 *infra*.

87. 32 C.F.R. § 2000.3(e) (1974). All other remedies must be exhausted before the ICRC will hear an appeal. 32 C.F.R. § 2000.5(b) (1974). Appeals must be submitted within 60 days after the request has been denied, must include a statement of the agency denying the request and should include all correspondence on the matter. 32 C.F.R. § 2000.5(a) (1974).

88. 32 C.F.R. § 2000.5(c) (1974). Relevant considerations include the following: (1) the nature of the documents sought; (2) their relationship to other classified documents; (3) the likelihood of early public release upon declassification; (4) any disagreement between agencies regarding proper classification.

89. 32 C.F.R. § 2000.5(c) (1974).

90. 32 C.F.R. § 2000.5(e) (1974).

91. 32 C.F.R. § 2000.3 (1974). A quorum for an appeal consists of seven members of the committee or their designated alternates. The requester must be notified in writing of the ICRC's decision and, if the appeal is denied, its reasons for the denial. 32 C.F.R. § 2000.5(f) (1974).

92. Exec. Order No. 11652 § 13(A), 3 C.F.R. 349 (1974).

93. Exec. Order No. 11652 § 13(A), 3 C.F.R. 349 (1974). Compare Exec. Order No. 11652 § 13(B), 3 C.F.R. 350 (1974): "The head of each Department is directed to take prompt and stringent administrative action against any officer or employee . . . determined to have been responsible for any release . . . of national security information . . . not authorized Where a violation of criminal statutes may be involved, Departments will refer any such case promptly to the Department of Justice."

The Directive allows agency committees to recommend penalties as severe as suspension without pay or removal, or as light as the issuance of warning letters or formal reprimands.⁹⁴ Generally, agency regulations reflect the spirit, if not the exact form, of the E.O. and the Directive.⁹⁵

2. *The System in Practice*

To examine the actual operation of the classification system, it is useful to divide the discussion into three parts. First, an attempt will be made to determine the kind of information that is being classified under the system. Second, the procedural aspects of the system will be considered. Finally, attention will be given to the problem of access to classified material.

a. *Classification in practice.* There is, inherent in any classification system, a certain tension between the government's need for secrecy, and the public's need for information. On the one hand, there is no doubt that some government-held information should not be circulated freely. War plans, descriptions of military techniques, information regarding the capabilities of certain weapons, and pseudonyms of American covert operatives may all fall into this category. It also seems reasonable to believe that records of internal debates on foreign policy matters and confidential information received from foreign countries should be kept exclusively within the government. Dissemination of this kind of information might do considerable damage to this country, while public benefit from the release of this material would not be great. It is thus appropriate to classify such items.

On the other hand, effective democratic government requires public debate of vital issues. Because such debate is possible only if adequate information is available, any procedure that inhibits the flow of information potentially interferes with this goal. If the classification system in fact permits the suppression of information that is needed by the public in order to make informed political choices, the operation of that system arguably runs counter to the public interest. Thus, the question that must be addressed is whether information needed by the public and not dangerous to the welfare of the country is being concealed.

It is obviously not possible for persons outside the government

94. NSC Directive, *supra* note 14, § XD, 3A C.F.R. 240 (1972).

95. Some agencies make no distinction between penalties for under-classification or unauthorized disclosure and penalties for excessive classification. *E.g.*, 28 C.F.R. § 17.7 (1974) (Justice Department). Others provide different sanctions for the two offenses in separate regulations. *E.g.*, 22 C.F.R. § 9.63 (1974) (State Department; security violation), 22 C.F.R. § 9.64 (1974) (State Department; over-classification); 32 C.F.R. § 159.1400-1(a) (1974) (Defense Department; abuse of the classification process or negligence regarding the safeguarding of classified information), 32 C.F.R. 159.1400-1(b) (1974) (Defense Department; unauthorized disclosure).

to examine a sample of classified information large enough to indicate the kinds of information that are classified. Therefore, this discussion will focus on two recently revealed instances in which the executive branch sought to conceal information considered to be too sensitive for public dissemination. An attempt will be made to draw some conclusions from these examples about the effectiveness of the E.O.'s classification policy.

The first instance of executive branch secrecy involves the 1973 bombing of Cambodia by American forces. Early in that year, Senator Harold Hughes requested a summary of United States air actions over Cambodia from the Defense Department.⁹⁶ The response indicated that no such actions had occurred prior to May 1970.⁹⁷ Then, in July 1973, it was revealed that a former officer of the United States Air Force had told Senator Hughes that American aircraft had operated over Cambodia prior to May 1970.⁹⁸ The officer, who claimed to have been a participant in the operation, later explained that he had been ordered to falsify reports to make it appear as though the raids had been carried out over Vietnam.⁹⁹ He added that it was his understanding that the purpose of the falsification was to keep knowledge of the bombings from anti-war Congressmen.¹⁰⁰

After the officer's statements were made public, Secretary of Defense Schlesinger acknowledged that falsifications had occurred and defended their use. He argued that such measures were necessary to prevent compromise of the bombing, in view of its diplomatic sensitivity.¹⁰¹ Allegedly, Cambodia's then Premier, Prince Norodom Sihanouk, had approved the raids.¹⁰² Because Sihanouk could not have publicly admitted this, disclosure of the American operation would have obliged him to demand its cessation. American officials thus thought it necessary to refrain from admitting that the raids were being conducted.¹⁰³ Sihanouk himself strongly denied ever approving the bombings.¹⁰⁴

In congressional testimony, the former chairman of the Joint Chiefs of Staff, General Earle G. Wheeler, explained that the military adopted the falsified reporting system after President Nixon ordered

96. N.Y. Times, July 16, 1973, at 5, col. 1 (city ed.).

97. *Id.* In that month, American and South Vietnamese troops began military operations within Cambodia aimed at eliminating North Vietnamese sanctuaries in that country. N.Y. Times, May 1, 1970, at 1, col. 8 (city ed.).

98. N.Y. Times, July 15, 1973, at 1, col. 1 (city ed.).

99. *Id.*

100. *Id.*

101. N.Y. Times, July 17, 1973, at 1, col. 1 (city ed.).

102. N.Y. Times, July 25, 1973, at 4, col. 3 (city ed.).

103. N.Y. Times, July 18, 1973, at 36, col. 2 (city ed.).

104. N.Y. Times, July 25, 1973, at 1, col. 1 (city ed.).

that the bombing be conducted under maximum security.¹⁰⁵ Further investigation by the Senate revealed that, although the false reporting of the Cambodian bombing ended after the May 1970 ground operations began, such falsification continued through 1972 with respect to bombing in northern Laos.¹⁰⁶

No sanctions were ever imposed for these falsifications. Indeed, President Nixon vigorously defended the actions taken, stating that those "who had any right to know or need to know" had been informed.¹⁰⁷

Although the method of secrecy employed by the executive branch in the Cambodian affair involved falsification of data, there is reason to believe that the same effect could have been achieved through the use of the classification system. The current E.O. had not been adopted when the bombing of Cambodia took place. However, knowledge of the incident became public over a year after the effective date of the E.O. During the ensuing controversy over the affair there was no suggestion that the procedures of the new E.O. would have prevented the concealment that occurred, had classification been used. In fact, President Nixon's apparently strong belief in the need for secrecy in this case indicates that information concerning the bombing would not have been revealed, whatever method of concealment had been employed.

Central Intelligence Agency operations in Chile from 1970 to 1973, involving the channeling of funds to various political groups opposing President Allende,¹⁰⁸ provide a second example of information kept secret by the executive branch.

The facts about the Chilean operation became public in September 1974, after the press obtained a letter that Congressman Michael Harrington had sent to the chairman of the House Foreign Affairs Committee. The letter revealed that CIA Director William S. Colby admitted in congressional testimony that the CIA had in fact engaged in covert political activity in Chile.¹⁰⁹ In public statements, administration officials had consistently denied this.¹¹⁰

President Ford maintained that the Chilean operation was aimed at preserving a democratic opposition in Chile and defended the

105. N.Y. Times, July 31, 1973, at 1, col. 1 (city ed.).

106. N.Y. Times, July 29, 1973, at 1, col. 4 (city ed.).

107. Speech before Veterans of Foreign Wars convention, New Orleans, La., Aug. 20, 1973, in N.Y. Times, Aug. 21, 1973, at 1, col. 8 (city ed.).

108. N.Y. Times, Sept. 12, 1974, at 5, col. 3 (city ed.).

109. N.Y. Times, Sept. 9, 1974, at 3, col. 4 (city ed.).

110. N.Y. Times, Sept. 17, 1974, at 1, col. 1 (city ed.). While it later appeared that some information bearing generally on the subject had been provided to a subcommittee of the Senate Foreign Relations Committee, Senators familiar with that material insisted that the statements that had been made had been misleading. N.Y. Times, Sept. 12, 1974, at 5, col. 3 (city ed.).

government's attempt to keep the activity secret by pointing out that it would have had no chance of success had it been revealed.¹¹¹ This, then, is an example of information that is kept secret—is, in effect, “classified”—solely because a political decision is made that the underlying activity involved is legitimate, and must be carried out covertly to be successful. The E.O.'s classification scheme, which provides the legal basis for the government's secrecy system, apparently does not prevent such a result.

From these examples, two conclusions can be drawn about the scope of the current classification system and its effectiveness. First, it is apparent that the system can be used to conceal major American policy decisions. The bombing of Cambodia involved a decision to violate neutral territory and the Chilean incident involved a decision to enhance political opposition to a legal government with which the United States ostensibly had friendly relations. By keeping information about incidents such as these secret, the public cannot evaluate effectively the foreign policy of the United States.

Second, it is probably fair to say that despite the contrary language in the E.O.,¹¹² the system does not prevent classification for political reasons. The strong presidential defense of government secrecy in both of the above cases indicates that at least some information will be concealed whether or not it falls within the E.O.'s definition¹¹³ of properly protected information. And, even accepting the legitimacy of the initial classification decisions in the Cambodian and Chilean affairs, it is still apparent that the classification in those instances was continued after the rationale for concealment no longer obtained. Information about the Cambodian bombing, originally kept secret to avoid embarrassing Sihanouk, remained classified long after the United States had stopped taking Sihanouk's needs into consideration. Likewise, the Chilean activities were concealed even after the overthrow of Allende made concealment of assistance to his enemies superfluous. It is thus likely that the classifications were continued in both cases to avoid embarrassment and potential political damage to the incumbent administration.

b. *The procedure in practice.* The analysis of the scope of classification under the E.O. involved drawing inferences from a few published sources. Far more information is available about the workings of the more technical aspects of the classification system.

Perhaps the most notable achievement of the current E.O. has been its impact on the distribution of classification authority. As of December 1973, 17,364 persons were authorized to classify information.¹¹⁴ Of these, 1,541 persons had Top Secret classification au-

111. News Conference, Sept. 16, 1974, in N.Y. Times, Sept. 17, 1974, at 20, col. 4 (city ed.).

112. See text at note 29 *supra*.

113. See text at note 22 *supra*.

114. ICRC REPORT, *supra* note 2, at 16.

thority,¹¹⁵ and therefore could exempt information from the operation of the General Declassification Schedule. These figures reveal a 71 per cent reduction in the total number of classifiers from that authorized by the previous executive order, and a 78 per cent reduction in the number of Top Secret classifiers.¹¹⁶ In addition, 11 agencies that formerly possessed Top Secret classifying authority lost it under the current system,¹¹⁷ the most notable eliminations being the Department of Commerce and the United States Information Agency. Dramatic cuts affected all other agencies, both in the total number of classifiers and in the number of Top Secret positions.¹¹⁸

Although the new E.O. has drastically reduced the number of authorized classifiers, it is possible that there has not been a very great change in agency classification practices. The Department of State regulation requiring the originator of a document to classify it pending final approval by someone with classification authority¹¹⁹ probably reflects the procedure in most agencies. Thus, unless the authorized classifier regularly second-guesses his subordinates on such matters, the number of persons who actually assign classifications, as compared to the number authorized to do so, may well not have declined by much.

Another aim of the current E.O. is to reduce the number of documents classified. It is, unfortunately, not possible to determine precisely whether this goal has been achieved. The ICRC report for 1974 states, however, that "the Committee has been informed by several agencies that they estimate that there has been a marked reduction in the number of documents classified this past year. The [Atomic Energy Commission], for example, shows an 83 per cent reduction in the number of documents classified Top Secret in 1973. The [United States Information Agency] estimates that 30 per cent fewer documents were classified in 1973 than in 1972."¹²⁰ And the recent congressional testimony of Ambassador Carol C. Laise, Assistant Secretary of State for Public Affairs, also indicates that the E.O. has been effective in this area:

[D]uring the recent nine-month period, only approximately 16% of the telegrams sent to the field from the Department were classified, compared to between 35% and 40% of comparable traffic in periods prior to the Executive order. Only about 20% of the docu-

115. *Id.*

116. *Id.*

117. These are Canal Zone, Civil Aeronautics Board, Civil Service Commission, Department of Commerce, Export-Import Bank, Federal Maritime Commission, Federal Power Commission, Department of Health, Education, and Welfare, United States Information Agency, National Science Foundation, and Department of Transportation. *Id.* at 11-16.

118. *See id.* at 11-16.

119. *See* text at note 46 *supra*.

120. ICRC REPORT, *supra* note 2, at 21-22.

ments of historical significance now being recorded in our files are classified, compared with an estimated 40% to 50% in earlier years.¹²¹

There is thus some evidence that a smaller proportion of executive branch documents are being classified than was formerly the case. If the number of persons effectively classifying documents has in fact remained static, this reduction in classification could be attributable to a stricter adherence to classification criteria, at least among low-ranking personnel.

Information on the use of exemptions from the General Declassification Schedule is not currently available for the entire executive branch. However, figures are available for the three agencies—the CIA, the Defense Department, and the Department of Justice—that together produce about ninety-five per cent of all materials classified by the executive branch.¹²² These figures show that well over half of the documents being classified by these agencies are being shielded from automatic disclosure.¹²³ This rate suggests that the exemption provisions are being abused.¹²⁴ The little information available indicates that these agencies seldom apply sanctions for abuse of the system, however.¹²⁵

In contrast to the above approach, the State Department has been relatively restrained in its departures from the General Declassification Schedule. During the first quarter of 1974, the only period for which figures are available, only 11.4 per cent of its classified docu-

121. *Government Secrecy Hearings*, *supra* note 4, at 171.

122. This estimate is based on statistics in the Table in ICRC REPORT, *supra* note 2, at 23.

123. Recent congressional testimony indicates that approximately 96 per cent of the classified documents generated by the CIA are exempted from automatic declassification. *Government Secrecy Hearings*, *supra* note 4, at 102. A recent report from the Department of Defense states that a survey of 75 of its activities revealed that 7 per cent of the documents generated by the Defense Department were marked for declassification earlier than would have been required by the General Schedule, 42 per cent were placed under the General Schedule, 42 per cent were exempted, and 7 per cent were excluded. *Id.* at 504. ("Exclusion" refers to documents containing information classified prior to the current system. *Id.* at 246.) The Department of Justice reports that between January 1973 and March 1974 87 per cent of the classified documents it generated were exempted. *Id.* at 162-63.

124. See text at note 130 *infra*.

125. 1 *Executive Privilege, Secrecy in Government, and Freedom of Information*, *Hearings on S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, S. 1923 and S. 2073 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations and the Subcomms. on Separation of Powers and Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 187 (1973) (3 vols.) [hereinafter *1973 Senate Hearings*]. See generally Classification Abuse Reports, in *Government Secrecy Hearings*, *supra* note 4, at 648-68. The CIA report indicates that the sanction generally imposed for over-classification was an oral reprimand. *Id.* at 662-65. In this period, no individual classification abuses were reported by the Defense Department. *Id.* at 657-58.

ments were exempted from automatic declassification.¹²⁶ Furthermore, the State Department has actively warned offending employees against classification abuses: Between April 1974, when the Department began to use an automatic data processing system to monitor abuses, and July 1974, when it dispatched an airgram on the subject to all of its overseas posts, it issued over 400 warning letters.¹²⁷ One of the recipients was an Assistant Secretary of State.¹²⁸ In view of the importance to the public of State Department operations, this emphasis on avoiding over-classification is most encouraging. The beneficial effect of the State Department approach is somewhat limited however, given the fact that it generates only about one per cent of the classified information held by the executive branch.¹²⁹

Taken together, the figures on the use of exemptions and the issuance of warning letters are disturbing. It seems fair to assume that the General Declassification Schedule was intended to be followed in most cases. Certainly, the language of the section of the E.O. permitting exemptions from the Schedule¹³⁰ indicates that exemptions should be invoked only rarely. The widespread use of exemptions by the Defense and Justice Departments, and by the CIA, thus appears contrary to the intention of the Order. Any suggestion that the time limits established by the E.O. are unrealistically short, forcing departures from the General Schedule, seems refuted by the experience of the State Department. Even allowing for differences in the character of the information handled by the different agencies, the great disparity in the use of exemptions between the State Department and the other agencies may reflect a certain indifference in the latter organizations toward the problem of over-classification. This impression is reinforced by the apparent laxity with which these agencies apply sanctions for classification abuse.

c. *Access to classified information.* The question of nonexecutive branch access to information actually involves two separate problems, access by the Congress and access by the public. Congress must make certain that it has access to information that, though legitimately classified, is necessary to its deliberations. The public's interest is limited to ensuring that information that ought to be freely available is not classified. The differences between these two problems require

126. *Government Secrecy Hearings*, *supra* note 4, at 605 (Department of State, Answers to Questions Submitted by the Muskie Subcomm., answer to question five).

127. Department of State Airgram, Classification and Declassification of National Security Information and Material 1, July 18, 1974.

128. *Government Secrecy Hearings*, *supra* note 4, at 604 (Department of State, Answers to Questions Submitted by the Muskie Subcomm., answer to question 3).

129. This figure was calculated from the Table in ICRC REPORT, *supra* note 2, at 23.

130. Exec. Order No. 11652 § 5(B), 3 C.F.R. 344-45 (1974). See text at notes 67-68 *supra*.

that they be discussed separately. Because of the lack of data regarding access to information, it is again necessary to resort to the case approach.

Since both examples of government secrecy discussed earlier¹³¹ involved the problem of congressional access to classified information, they will be drawn upon again at this point. One further incident involving congressional access to classified information, the "rain-making case," should also be noted.

In the fall of 1971, Senator Claiborne Pell repeatedly and unsuccessfully sought information from the Defense Department concerning rumors that the United States was using weather modification as a weapon in Indo-China.¹³² His requests were refused on the grounds that the information was classified and had already been provided to the appropriate congressional committees.¹³³

Subsequently, the press obtained the facts Senator Pell sought.¹³⁴ It was revealed that during 1970 and 1971, the United States had seeded clouds in areas over the Ho Chi Minh trail in Laos in an effort to impede transportation over the trail and to interfere with the operation of North Vietnamese anti-aircraft weapons.¹³⁵ The program had aroused considerable opposition within the executive branch, both because there were doubts as to its effectiveness and because the idea of using weather as a weapon made a number of civil servants uneasy.¹³⁶ Nevertheless, in subsequent congressional testimony, Defense Department representatives maintained that, beyond keeping the Armed Services Committees up to date, their agency had no obligation to inform Congress of these activities.¹³⁷ Other than ask the Chairman of the Senate Armed Services Committee to discuss the matter with Senator Pell, the Department representatives did nothing further to meet his request.¹³⁸ Although

131. See text at notes 96-113 *supra*.

132. In September 1971, Senator Pell wrote to R. Johnson, Assistant to the Secretary of Defense for Legislative Affairs, concerning these rumors. *Government Information Hearings*, *supra* note 61, at 3174-75. Senator Pell, Chairman of the Senate Subcomm. on Oceans and the International Environment, asked for an account of the use of such techniques. Receiving only an acknowledgement of receipt of his letter, he again wrote to Johnson in November 1971. Johnson responded with a very general account of Defense Department weather experiments and did not address Pell's specific inquiry regarding military use of cloud-seeding techniques. *Id.* at 3175-76. Dissatisfied with Johnson's reply, Senator Pell wrote to Defense Secretary Laird repeating his original request. *Id.* at 3176. Senator Pell received a response written by Dr. J. Foster, Pentagon Director of Defense, Research, and Engineering, again declining to give Pell the information he sought. *Id.*

133. *Id.* at 3176-77.

134. N.Y. Times, July 3, 1972, at 1, col. 6 (city ed.).

135. *Id.*

136. *Id.*

137. *Government Information Hearings*, *supra* note 61, at 3177-80.

138. *Id.* at 3177.

this testimony was given only eight days prior to the effective date of the current E.O., the representatives did not suggest that the new classification system would alter Defense Department procedure in this regard.

In the "rain-making case," Congress was denied knowledge of a particular method of waging war. In the Cambodian and Chilean affairs, Congress was deceived as to American policy toward the countries involved. Yet, it has been suggested that, to carry out its constitutional duties, Congress has need for information that reveals whether (1) the United States has troops engaged in combat in a particular area; (2) the United States is financing a particular undertaking; (3) negotiations are taking place with regard to a certain question, without necessarily revealing the substance of the negotiations; (4) sophisticated intelligence-gathering systems exist; and (5) there exist agreements calling for commitment of American human or material resources under certain contingencies.¹³⁹ And it seems logical to add that Congress should generally be informed of administration policy with regard to a particular area or subject. Thus, under these criteria, Congress was denied information that it needed to perform its duties effectively in these three instances. It would therefore appear that, at least in some cases, the classification system hinders the operation of the legislature.

Even in cases where Congress can obtain classified information, there is still the difficulty of knowing what to ask for. Regulations permitting agencies to deny information to the GAO, and the practice of delaying responses to congressional inquiries, are part of the problem.¹⁴⁰ Agency limitations on distribution of classified material, such as the State Department's nodis, exdis, and so on,¹⁴¹ also reduce the likelihood that anyone in Congress will come to know that he or she should ask questions.

The three cases above illustrate the irregular methods by which Congress occasionally does learn of the existence of vital information. Rumors, reinforced by leaks to the press, triggered Senator Pell's cloud-seeding inquiries.¹⁴² In the Cambodia case, Congress remained unaware of the secret bombing until a participant in the operation made the facts known.¹⁴³ The truth of the Chilean situation was explained to one congressional committee in closed-session testimony,¹⁴⁴ but other committees, with equal responsibilities in the

139. *Government Secrecy Hearings*, *supra* note 4, at 78 (Senator Muskie, summarizing previous testimony before his committee).

140. See notes 61, 65-66 *supra* and accompanying text.

141. See text at notes 54-57 *supra*.

142. See text at notes 132-34 *supra*.

143. See text at notes 96-100 *supra*.

144. See note 110 *supra*.

area, remained uninformed until a leak occurred. In the "rain-making" case, Senator Pell never got the material he sought, and was obliged to accept a compromise.¹⁴⁵ In the other two cases, however, Congress got the information it wanted, once it knew what to ask for and whom to ask.

The problem of public access to national security information, unlike that of congressional access, is basically one of avoiding incorrect classification. Achieving this goal requires, first, that decisions to classify be based solely on conclusions that the information in question cannot safely be made public, and, second, that an adequate means of challenging these decisions be available to the public.

McGeorge Bundy, former Presidential Special Assistant for National Security, has analyzed the kinds of information that would be classified under a system that was oriented toward public access. He has suggested that six types of material must be concealed: (1) military contingency plans; (2) the substance of current diplomatic negotiations; (3) information concerning covert political activity, assuming such activity is found justifiable; (4) information concerning covert intelligence gathering; (5) material whose potential for embarrassment is greater than its power of enlightenment; and (6) material revealing a President's decisional processes.¹⁴⁶

In determining whether the current classification system protects only information meeting these criteria, the three cases discussed above again serve as useful examples. Some elements of each incident could reasonably have been kept secret from the general public. The precise techniques used in rain-making, the details of the bombing operations in Cambodia, and perhaps even the existence of the Chilean covert operation would fall within one or another of Bundy's categories. If rain-making is treated as a secret weapon, it would even be possible to make a case for classification of the existence of a cloud-seeding capability. But concealing both the military operations in Cambodia, and the government's support of active opposition to the Allende regime, is much less defensible. Democratic government assumes the power of the electorate to evaluate government policy-making. But voters cannot pass judgment on policies of which they are unaware. The classification system permitted the executive branch to keep American foreign policy secret in these instances. This degree of executive discretion seems excessive.

The E.O.'s mandatory review procedures¹⁴⁷ do not appear to be adequate to correct these problems of over-classification. Although

145. See text at note 138 *supra*.

146. *Government Secrecy Hearings*, *supra* note 4, at 14-16.

147. See text at notes 78-91 *supra*.

148. In 1973, for example, there were 621 declassification requests made to execu-

the system has functioned well in some cases,¹⁴⁸ its use has not been general¹⁴⁹ and few requests for review have been carried beyond the initial stage.¹⁵⁰ Agencies appear to have acted promptly when they have acted at all,¹⁵¹ but over one third of the requests received by the agencies are not acted on at all,¹⁵² and pending periods for these requests are often long.¹⁵³

There are several deficiencies in the structure of the review system that may account for its inability adequately to protect the public interest. First, use of the procedure is limited, for the most part, to documents classified for more than ten years;¹⁵⁴ this undoubtedly

tive agencies; 306 were granted in full, 85 were granted in part, 80 were denied, and 150 were still pending at year's end. Among the 5 key foreign affairs agencies (CIA, Departments of Defense and State, National Security Council, and other units of the Executive Offices of the President), however, the average is not quite as impressive. These bodies received 588 of the requests and granted 288 in whole and 79 in part; 77 of the denials and 144 of the requests still pending involved these bodies. ICRC REPORT, *supra* note 2, at 20.

Information is available in somewhat more detail for the Defense and State Departments. From the date of the promulgation of the E.O. in June 1972 through April 1974, the Defense Department received 582 requests; 534 were acted on within that period and information was released in whole or in part in 85 per cent of the cases. *Government Secrecy Hearings*, *supra* note 4, at 209. In 1973 and the first three months of 1974, the State Department received 312 declassification requests; documents totalling 28,861 pages were involved. *Id.* at 167. Seventy-eight per cent of these documents were released, 2.7 per cent were denied, and the remaining 56 requests were still pending at the end of the period.

149. Agency reports on mandatory review requests for the period from October 1973 to March 1974 indicate that only about 200 individuals and organizations filed the 500 plus requests received during this period. See Mandatory Declassification Review Request Reports, in *Government Secrecy Hearings*, *supra* note 4, at 472-500 (CIA), 508-85 (Defense Department), 592-603 (State Department), 669-88 (all other agencies). Moreover, almost all of these requests came from academic researchers or from other governmental agencies. *Id.* Only 9 journalists and news organizations made use of the system. *Id.*

150. The agency committees considered only 17 appeals between June 1972 and April 1974. See Mandatory Declassification Review Request Reports, *supra* note 149.

As of April 1974, the ICRC itself had received only six appeals from denials of mandatory review requests. It reversed the agencies involved twice, remanded for a review that resulted in a partial release once, and affirmed the denials in three cases. ICRC REPORT, *supra* note 2, at 42. It is not known how many appeals, if any, the ICRC has declined to hear in the exercise of its discretion. Nor is it possible to analyze the decisions in the cases that have been heard, as the Committee's sessions are closed. 32 C.F.R. § 2000.5(e) (1974).

151. Examination of a sample of mandatory review request reports indicates that, for the period studied, the average interval between submission of a request and final action on it was between seven and eight weeks. See Mandatory Declassification Review Request Reports, *supra* note 149. There were instances of delays of over nine months, however. See, e.g., *id.* at 595 (No. 24). The average delay for the Department of State was more than twice as long as that for all other agencies together. *Id.* at 592-603.

152. See Mandatory Declassification Review Request Reports, *supra* note 149.

153. See note 151 *supra*.

154. See note 79 *supra* and accompanying text. Only the AEC and the State Department will consider declassification requests involving material more recently classified.

tends to confine resort to the procedure to persons with an historical interest in the classified material. Second, the need, in some instances, to obtain the concurrence of other agencies prior to declassifying makes declassification review difficult and time consuming.¹⁵⁵ Third, the small size of the ICRC staff, which in May 1974 consisted of the executive director and one secretary,¹⁵⁶ may limit that body's capacity to hear review appeals.¹⁵⁷ Finally, the system does not provide for review of procedurally based denials of declassification,¹⁵⁸ and there is no extra-agency oversight of these denials.¹⁵⁹

From the foregoing, it is clear that the present system does not adequately solve the problem of public access to government-held information.

3. *Changing the System*

The above examination of the functioning of the current classification system reveals that the system permits the executive branch to retain over-broad discretion in the classification area. While the danger that this situation poses to the interests of both the Congress and the public is obvious, the remedy is not. The remedial problem is exacerbated, in part, by the existing controversy over whether Congress can lawfully take action in this area. This section will thus consider first, the legality of legislative reform of the classification system, and second, the adequacy of recently proposed legislative changes.

a. *The legal foundation of security classification.* The security classification system currently in force was established by executive order in March 1972.¹⁶⁰ The order cites as its legal basis the power

155. This seems to be a particular problem for the Departments of State and Defense. *Government Secrecy Hearings*, *supra* note 4, at 167 (testimony of Ambassador C. Laise), at 209 (testimony of D. Cooke, Deputy Assistant Secretary, Department of Defense).

156. *Government Secrecy Hearings*, *supra* note 4, at 93 (testimony of J. Rhoads, Archivist of the United States and Acting Chairman of ICRC).

157. *Id.* at 97-98. One cannot gauge how broadly the ICRC is interpreting its power to oversee the security classification system. The Acting Chairman of the Committee has acknowledged that the ICRC has thus far not tested its authority to the fullest. For example, while it has the power to deal with all classification abuses, it has restricted its focus to improper denials of mandatory review requests. *Id.*

158. See text at note 89 *supra*.

159. During the period from October 1973 to March 1974, executive agencies denied only about one per cent of all requests on procedural grounds, however. See Mandatory Declassification Review Request Reports, *supra* note 149.

160. Exec. Order No. 11652, 3 C.F.R. 339 (1974). Ever since classification authority was extended to nonmilitary executive agencies, see text at note 7 *supra*; H.R. REP. NO. 93-221, 93d Cong., 1st Sess. 9 (1973), it has been governed by executive orders. Executive orders are issued by the President to direct "[f]ederal government officials or agencies to take some action on particular matters." Comment, *Presidential Legislation by Executive Order*, 37 COLO. L. REV. 105, 106 (1964). Since the security classification system prescribes procedures to be followed by federal agencies when dealing

vested in the President "by the Constitution and the statutes of the United States."¹⁶¹ In hearings before a House Subcommittee, Assistant Attorney General Ralph E. Erickson amplified this statement by stating that the E.O. was based on the President's constitutional powers and duties, rather than on express statutory authority.¹⁶² According to Erickson, the order is simply one means by which the President supervises the employees of the executive branch¹⁶³ and ensures that certain laws, such as those concerning espionage and sabotage, are faithfully executed. Erickson pointed out that Congress has enacted a number of statutes that assume the existence of a security classification system, although none expressly authorizes one.¹⁶⁴

with certain types of information, the use of executive orders to direct the adoption of these procedures seems to be appropriate.

The legality of an executive order depends on the legality of the action that the President has ordered. That is, the validity and enforceability of an executive order is analyzed by referring to the powers conferred on the President by the Constitution and by statute. The legality of the current E.O. thus turns on the scope of the President's authority to control sensitive information. For a discussion of the various questions raised by presidential legislation through the use of executive orders, see Comment, *supra*; Comment, *Executive Orders and the Development of Presidential Power*, 17 VILL. L. REV. 688 (1972).

161. Exec. Order No. 11652, preamble, 3 C.F.R. 339 (1974).

162. *Government Information Hearings*, *supra* note 61, at 2824-25.

163. Erickson maintained that Article II, section 1 (vesting executive power in the President), section 2 (making the President Commander-in-Chief of the armed forces), and section 3 (requiring the President to take care that the laws be faithfully executed), taken together, require the President to supervise the employees of the executive branch. *Government Information Hearings*, *supra* note 61, at 2824.

164. *Id.* at 2824-25. For example, Erickson referred to the Espionage Acts, 18 U.S.C. §§ 792-99 (1970), as "alternatively refer[ring] to classified information or mak[ing] it imperative to establish a classification system in order to enforce them fairly and effectively," and cited *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945), in support of this statement. In that case the court held that a conviction under the Espionage Acts for disclosure of information relating to the national defense could not be based on the collection and transmittal of information lawfully made public. Judge Learned Hand observed, "The services must be trusted to determine what information may be broadcast without prejudice to the 'national defense,' and their consent to its dissemination is as much evidenced by what they do not seek to suppress, as by what they utter." 151 F.2d at 816. It thus appears that information is not subject to the protection of the Espionage Acts unless the executive has classified it.

Erickson also noted that 50 U.S.C. § 783(b) (1970), prohibiting United States Government employees from communicating to a foreign agent "any information of a kind which shall have been classified by the President . . . as affecting the security of the United States," assumes the existence of a classification system. *Government Information Hearings*, *supra* note 61, at 2825.

In addition to the statutes Erickson mentioned, several other statutes appear to take for granted the existence of a classification system. For example, 18 U.S.C. § 798 (1970) prohibits the willful communication to unauthorized persons of certain types of "classified information"; classified information is defined as "information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution." Similarly, the President is obliged by 22 U.S.C. § 2394(b) (1970) to make public all information concerning operations of the Development Loan Fund "not deemed by him to be incompatible with the security of the United States." And 22 U.S.C. § 2585 (1970), requiring security clearances for personnel of the Arms Control and Disarmament Agency, also assumes the existence of "classified information."

He thus implied that this legislation indicates congressional recognition of the legitimacy of the executive classification procedures.

The authority of the executive branch to classify information has not been challenged. Since 1875, the Supreme Court has recognized the President's power to protect information he deems vital to national security, provided that neither legislation nor a judicial subpoena restricts his ability to act.¹⁶⁵ Most recently, in *United States v. Nixon*,¹⁶⁶ the Court was careful to observe that the matter came before it "[a]bsent a claim of need to protect military, diplomatic or sensitive national security secrets"¹⁶⁷ Thus, even as it rejected President Nixon's claim that the value of preserving the confidentiality of presidential conversations outweighs that of providing evidence essential to a criminal prosecution, the Court deferred, as it traditionally has, to the President's military and diplomatic duties.¹⁶⁸ The question that must be answered, then, is not whether the executive possesses the authority to classify information, but whether its authority to do so is exclusive.

Professor Robert G. Dixon, former Assistant Attorney General in charge of the Office of Legal Counsel, has argued that the President has exclusive authority in the classification area. In testimony before the Senate Subcommittee on Intergovernmental Relations,¹⁶⁹ Professor Dixon began by citing Justice Stewart's concurring opinion in *New York Times v. United States*,¹⁷⁰ in which Stewart stated that "it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its

165. See *Totten v. United States*, 92 U.S. 105 (1875), in which plaintiff, the administrator of the estate of an individual who had spied for the federal government during the Civil War, alleged that the terms of a secret contract between President Lincoln and the decedent entitled the latter to more money than he had received. The Supreme Court affirmed the lower court's denial of the claim; it reasoned that the suit could not be allowed, since its prosecution would require disclosure of matters that the public interest demanded be kept secret.

More recently, in *New York Times v. United States*, 403 U.S. 713 (1971), in which the Court refused to enjoin publication of the Pentagon Papers, Justice Marshall, concurring, observed, "In these cases, there is no problem concerning the President's power to classify information as 'secret' or 'top secret'. Congress has specifically recognized Presidential authority . . . to classify documents and information. . . . Nor is there an issue here regarding the President's power . . . to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks." 403 U.S. at 741. See also *United States v. Reynolds*, 345 U.S. 1 (1953), acknowledging the existence of a military-secrets evidentiary privilege.

166. 418 U.S. 683 (1974).

167. 418 U.S. at 706.

168. 418 U.S. at 710-11. See also text at notes 291-93 *infra*.

169. *Government Secrecy Hearings*, *supra* note 4, at 135-61.

170. 403 U.S. 713 (1971).

responsibilities in the fields of international relations and defense."¹⁷¹ Next, he quoted from *United States v. Curtiss-Wright Export Corp.*,¹⁷² in which the Supreme Court stated that in foreign affairs, "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or to listen as a representative of the nation."¹⁷³ Dixon also pointed to *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*,¹⁷⁴ where the Court said that "[t]he President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs,"¹⁷⁵ and added that, acting in these capacities, the President "has available intelligence services whose reports are not and ought not to be published to the world."¹⁷⁶ Lastly, Dixon noted that John Jay, in *The Federalist*, referred approvingly to the President's power to conduct negotiations in secret.¹⁷⁷ Hence, Dixon concluded that the President's exclusive power to establish a classification system may be inferred from his article II powers as Commander-in-Chief, and as conductor of the nation's international relations.¹⁷⁸

In general, Dixon did not approve of the idea of congressional action in the classification area. He asserted that allowing either a congressional committee or an independent agency to supervise the information-control program would necessitate a shared administration. Such a sharing, he contended, would violate the separation of powers principle by inserting nonexecutive authority into areas where the executive has primary responsibility—national defense and foreign relations.¹⁷⁹ Dixon pointed out that the President's power to remove officers discharging purely executive functions is constitutionally absolute.¹⁸⁰ Accordingly, Dixon reasoned that Congress could not place beyond the President's authority officers charged with the purely executive function of classifying documents.¹⁸¹ He found legislation dealing with classification standards less objectionable, but, as a practical matter, likely to require interpretation by the executive branch.¹⁸²

171. 403 U.S. at 729-30.

172. 299 U.S. 304 (1936).

173. 299 U.S. at 319.

174. 333 U.S. 103 (1948).

175. 333 U.S. at 109.

176. 333 U.S. at 111.

177. THE FEDERALIST NO. 64 (J. Jay).

178. *Government Secrecy Hearings*, *supra* note 4, at 157.

179. *Id.* at 151.

180. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) and *Myers v. United States*, 272 U.S. 52 (1926) were cited for this proposition. *Id.* at 151.

181. *Government Secrecy Hearings*, *supra* note 4, at 151-52.

182. *Id.* at 153.

With regard to legislation that would allow judicial review of classification decisions, Dixon cited *EPA v. Mink*¹⁸³ for the proposition that congressional power to legislate in the field of information is limited by executive privilege.¹⁸⁴ He pointed out that *Senate Select Committee on Presidential Campaign Activities v. Nixon*¹⁸⁵ held that the Senate Watergate Committee's need for the Watergate tapes was insufficient to outweigh the presumption of confidentiality to be accorded presidential conversations, and argued that, under *Nixon v. Sirica*,¹⁸⁶ an even stronger showing of congressional need would have to be made with regard to national security information. Although he recognized that *Nixon v. Sirica* held that a claim of national security privilege was reviewable, Dixon nonetheless maintained that such review could extend only to questions of extreme arbitrariness, and that a court, lacking expertise, could not substitute its judgment for that of the executive in this area.¹⁸⁷ Thus, Dixon concluded that congressional power to authorize judicial review of classification decisions is inherently limited.

Upon closer examination, however, it becomes evident that the cases relied on by Dixon do not necessarily support his conclusions. If, as Justice Stewart stated in *New York Times*, the executive's classification authority is not "a matter of law as the courts know law,"¹⁸⁸ then presumably that authority cannot be traced to an exclusive grant in the Constitution. If this is true, then there would seem to be no reason why Congress could not legislate on the subject. Moreover, Justice Marshall, in *New York Times*, makes explicit reference to Congress' acquiescence in the existence of a security system.¹⁸⁹ This reference indicates that Congress can act in the area.

Dixon's reliance on *Curtiss-Wright* is also misplaced.¹⁹⁰ That case involved congressional delegation to the President of the authority to determine whether banning United States arms shipments would contribute to ending a particular Latin American war. The congressional resolution provided that such sales would constitute criminal violations upon a presidential finding and proclamation that ending the weapons sales would in fact aid in restoring peace. The case in question arose when the Curtiss-Wright Corporation was convicted of making arms sales after such a proclamation had gone into effect. Justice Sutherland's disquisition upon the powers of the

183. 410 U.S. 73 (1973).

184. *Government Secrecy Hearings*, *supra* note 4, at 152.

185. 498 F.2d 725 (D.C. Cir. 1974).

186. 487 F.2d 700 (D.C. Cir. 1973).

187. *Government Secrecy Hearings*, *supra* note 4, at 152.

188. 403 U.S. 713, 729 (1971).

189. 403 U.S. 741. For text of Justice Marshall's statement, see note 165 *supra*.

190. 299 U.S. 304 (1936). See text at notes 172-73 *supra*.

executive¹⁹¹ thus must be seen in the context of an explicit delegation of authority by the Congress. It is a weak foundation on which to base an argument for congressional impotence in the field of foreign affairs.

*Chicago & Southern Air Lines Inc. v. Waterman Steamship Corp.*¹⁹² is also not apposite. Petitioner in that case sought review of the denial of a certification of convenience and necessity for a foreign air route. The Civil Aeronautics Act¹⁹³ gives the Civil Aeronautics Board (CAB) the power to authorize air carriers to use certain routes.¹⁹⁴ However, CAB rulings on applications by American carriers for foreign routes require the President's approval. The Act gives the federal circuit courts power to review CAB decisions,¹⁹⁵ and no exemption from review is provided for decisions concerning routes abroad. The petitioner in *Waterman* argued for judicial review of such decisions even though they involve discretionary determinations by the President. The Supreme Court rejected this contention. But in reaching this conclusion, the Court did not, as Professor Dixon implied, rely solely on the power of the Presidency. Instead, the opinion pointed out that the President's authority over the CAB was derived from a pooling of his own foreign affairs authority and Congress' power over foreign commerce, which it had delegated to him.¹⁹⁶ The Court, to be sure, extensively noted the practical superiority of presidential over judicial decision-making in the foreign affairs area. It went on to observe, however, that

even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, *Executive and Legislative . . .*. They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.¹⁹⁷

This case does support the notion that the judicial power over foreign affairs is limited. However, it does not support the proposition that Congress has no role to play in the area.

It cannot be persuasively argued that the executive's power over national security matters so outweighs that of the Congress that the latter lacks authority to enact legislation controlling national secu-

191. See text at note 173 *supra*.

192. 333 U.S. 103 (1948). See text at notes 174-76 *supra*.

193. 49 U.S.C. §§ 1301-542 (1970).

194. Civil Aeronautics Act § 401, 49 U.S.C. § 1371 (1970).

195. Civil Aeronautics Act § 1006, 49 U.S.C. § 1486 (1970).

196. 333 U.S. at 109-10.

197. 333 U.S. at 111 (emphasis added).

rity information. The Constitution vests the President with considerable power relating to foreign affairs and national defense.¹⁹⁸ But the powers granted to Congress in these areas are equally extensive.¹⁹⁹

The courts generally have not agreed with Dixon's claim that the executive branch has exclusive power in foreign affairs and national defense matters. For example, in *Oetjen v. Central Leather Co.*,²⁰⁰ the Supreme Court stated that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the 'political' Departments of the Government, and the propriety of what may be done in the exercise of this power is not subject to judicial inquiry or decision"²⁰¹

In *EPA v. Mink*,²⁰² the Supreme Court again recognized the legitimacy of congressional action in these areas. Representative Patsy Mink brought suit under the Freedom of Information Act to obtain certain documents from the Environmental Protection Agency (EPA) concerning the 1971 Amchitka nuclear test. The EPA resisted disclosure on several grounds, one of them being that some of the requested documents were classified, and so came within the Act's exemption for information "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."²⁰³ The Court held that a showing that these documents were classified under an executive order would satisfy the EPA's burden of proof on the exemption issue, and thus rejected

198. See note 163 *supra*.

199. Congress has been given the powers to "provide for the common Defense . . .," U.S. CONST. art. I, § 8, cl. 1; "[t]o regulate commerce with foreign Nations," U.S. CONST. art. I, § 8, cl. 3; "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," U.S. CONST. art. I, § 8, cl. 10; "[t]o declare War, grant Letters of Marque and Reprisal and make Rules concerning Captures on Land and Water," U.S. CONST. art. I, § 8, cl. 11; "[t]o raise and support Armies . . .," U.S. CONST. art. I, § 8, cl. 12; "[t]o provide and maintain a Navy," U.S. CONST. art. I, § 8, cl. 13; "[t]o make Rules for the Government and Regulation of the land and naval forces," U.S. CONST. art. I, § 8, cl. 14; and "[t]o provide for calling forth the Militia to . . . repel Invasions," U.S. CONST. art. I, § 8, cl. 15. Furthermore, the Senate's power to advise and consent to treaties and to the appointment of "Ambassadors, other public Ministers and Consuls . . .," U.S. CONST. art. II, § 2, also involves participation by the Congress in foreign affairs.

200. 246 U.S. 297 (1918). This case involved a suit for the value of certain hides seized in Mexico from a Mexican merchant by General Villa's forces while Villa was serving under General Carranza during the Mexican Civil War. Carranza's government was subsequently recognized by the United States. The Supreme Court held that the actions of one sovereign government could not be questioned in the courts of another and that recognition of a government invests any action it may have taken prior to recognition with a sovereign character.

201. 246 U.S. at 302. This statement was addressed to the issue of the locus within the United States Government of the power to extend diplomatic recognition.

202. 410 U.S. 73 (1973).

203. 5 U.S.C. § 552(b)(1) (1970), *as amended*, 5 U.S.C.A. § 552(b)(1) (Supp. Feb. 1975).

the contention that classification alone would not be enough to bring the material in question within the exemption. The Court observed that "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering. . . . But Exemption 1 does neither."²⁰⁴ In other words, although Congress has chosen to accept the executive determination of what should be classified, Congress is not obligated to do so. In his concurrence in *Mink*, Justice Stewart emphasized this point: "[Congress] has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been [I]n enacting § 552(b)(1) Congress chose . . . to decree blind acceptance of Executive fiat."²⁰⁵

In the face of such language, it is difficult to accept the proposition that "blind acceptance of executive fiat" is the only course that Congress may lawfully follow.²⁰⁶ And in fact, the executive branch has accepted without complaint other congressional attempts to control national security information. For example, the National Security Act of 1947 provides "[t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."²⁰⁷ If Congress has the authority to impose such a duty on an executive officer, it must possess some jurisdiction over government information policy. Far from questioning this assignment of responsibility, representatives of the CIA have relied on it, arguing against proposed alterations of the

204. 410 U.S. at 83 (dictum).

205. 410 U.S. at 95. The national security exemption of the FOIA has been extensively amended since *Mink* was decided. See text at notes 221-23, 506-35 *infra*.

206. Some commentators have read the language of *United States v. Nixon*, quoted in the text at note 167 *supra*, to support the notion of absolute presidential control of national security information. See, e.g., *Symposium: United States v. Nixon*, 22 UCLA L. Rev. 4, 26-29, 44, 64, 96, 117-18 (1974) [hereinafter *Symposium*]. There is good reason, however, for believing that such an interpretation puts too much emphasis on the quoted passage of the *Nixon* opinion. In the first place, this statement fairly could be characterized as dictum, since the matter before the court did not involve any claim of a national security privilege. Second, the language itself does not purport to prescribe what the result would be if national security matters were involved, but instead emphasizes the fact that they were not. To assume that such language announced a new rule of constitutional law would be somewhat questionable. The peculiar nature of the *Nixon* case pressured the Justices to ignore their differences over matters not bearing on the basic issue, see *Symposium, supra*, at 120-23, so "that one may recognize the circumstances of the case and accordingly, not regard its every phrase as the last possible word on the subject." *Id.* at 122-23. Moreover, *Mink* represents a consideration of the very point at issue, and so should be entitled to more weight than *Nixon* on that ground alone.

207. National Security Act of 1947, Pub. L. No. 80-253, ch. 243, § 102(d)(3), 61 Stat. 498.

current system on the ground that they would conflict with the Director's duty under this statute.²⁰⁸

Another example of congressional information control is provided by the statutory provisions governing atomic energy policy.²⁰⁹ In those sections, Congress defined the term "Restricted Data,"²¹⁰ and established regulations covering the dissemination of material coming within that definition.²¹¹ Indeed, even the espionage laws²¹² represent a congressional effort to regulate the disposition of certain national security materials. Yet, Dixon did not describe these statutes as encroaching upon an executive preserve.

In short, the argument that the control of national security information is exclusively an executive function is untenable. Therefore, it is not helpful to defend the executive's position by citing cases that deal with exclusively executive functions.²¹³ Similarly, to argue from cases concerning access to material covered by executive privilege begs the question;²¹⁴ while such cases would certainly be relevant to the matter of congressional access to information pertaining to activities that are exclusively within the executive sphere, they are much less relevant when the information is not of that character. In sum, it appears that Congress has some jurisdiction over foreign affairs and national defense matters, and so can act to remedy defects in the current classification system.

b. *Proposals for change.* The current classification system leaves unsolved the distinct problems of congressional access to classified information and public access to government-held information.²¹⁵ Any plan to change the current system must address itself to both. The discussion of the legal authority for the E.O. demonstrated that Congress may lawfully effect changes in the classification system.²¹⁶ The difficulty lies in determining what form corrective legislation should take.

There are certain interests that must be served by any classification system. Such a system must, of course, take account of the need for secrecy with regard to some government activity. It must allow for the Supreme Court's recognition in *Mink* of the doctrine of executive privilege.²¹⁷ It must also attempt to ensure that judgments

208. *Government Secrecy Hearings*, *supra* note 4, at 104 (testimony of J. Warner, General Counsel, Central Intelligence Agency).

209. 42 U.S.C. §§ 2161-66 (1970).

210. 42 U.S.C. § 2014(y) (1970).

211. 42 U.S.C. §§ 2162, 2163, 2165 (1970).

212. 18 U.S.C. §§ 792-99 (1970).

213. See note 180 *supra* and accompanying text.

214. See text at notes 185-87 *supra*.

215. See text at notes 131-59 *supra*.

216. See text at notes 160-214 *supra*.

217. See text at note 204 *supra*.

regarding information policy are made by properly informed individuals, as there are often circumstances in which the real sensitivity of certain information is apparent only to one familiar with the subject matter of the information.²¹⁸ The interests of foreign governments that have entrusted the United States with sensitive information must be considered. Finally, the system must be administratively feasible and as inexpensive as possible.

Any new classification system must also include elements that can remedy the difficulties that mar the current arrangement. First, it should eliminate needless classifications. This would entail a balancing of the possible detrimental effects of disclosure against its potential benefits. Second, since one intimately connected with the activities to be concealed might find it difficult to perform this balancing objectively, some form of continuing oversight from an independent review authority is necessary. Such an authority could guard against bureaucratic overcaution and lessen the danger of politically motivated classifications. Finally, the new system should contain an active review element. As things now stand, an incorrect classification is overturned only if an individual seeks review and later obtains favorable action in a review proceeding.²¹⁹ Consequently, information needed by the public but nonetheless classified may never come to light. It would seem preferable to create a body within the government with the authority to review all classification decisions. Such a body would necessarily operate on a spot check basis. It could correct immediately any improper classifications it discovered, and thus eliminate, at least in some cases, the delay inherent in the current system. Furthermore, this body could pursue its discoveries by reviewing all information relating to a particular subject to ensure proper classification. Finally, a spot check procedure may deter improper classifications by making it more likely that a particular classification abuse will be discovered. The reviewing body could closely scrutinize agencies with a history of classification abuse.

A system that takes account of these considerations is not likely to classify information unnecessarily and hence would further the public's interest. It is more difficult to ensure that Congress can keep itself abreast of matters that are correctly classified. In general, it seems clear that Congress can get the right answers when it asks the right questions. Thus, any device that keeps Congress informed should be helpful.

It should be noted that the problem of congressional access to

218. For example, intelligence information may reveal more to a trained analyst than to a layman. See *Government Secrecy Hearings*, *supra* note 4, at 56-57 (testimony of Dr. R. Cline, Director, Bureau of Intelligence and Research, Department of State).

219. See text at notes 67-91 *supra*.

classified material cannot be solved by passing a statute that asserts that Congress has a right to this information or that attempts to regularize procedures for dealing with situations in which the executive branch refuses to supply information. The congressional right exists, and cannot be made more explicit. The problem lies in enforcing the right, and enforcement depends upon congressional willingness to be firm in particular cases; a statute cannot supply this element.²²⁰ Moreover, a statute forbidding denial in certain categories may be read to permit the denial of everything else.

Congress took an important first step toward improving the classification system by enacting the Freedom of Information Act Amendments of 1974.²²¹ These amendments provide that only "properly" classified material shall be exempt from disclosure under the FOIA.²²² Further, they empower a court trying an FOIA disclosure suit to conduct an *in camera* inspection of the material in question to determine if it meets the exemption criterion.²²³ Thus, Congress has provided for formal nonexecutive review of the substantive basis of classification decisions.

While this legislation is helpful, it does not address most of the problems of the current system. The judiciary does not bring to classification questions the expertise that would give it the self-confidence to overrule executive determinations in this area. There will be a strong temptation to avoid reviewing classifications on "political question" grounds.²²⁴ The courts might also avoid the substantive issue by reading the term "properly classified" to mandate no more than compliance with procedural prerequisites, although such a reading would clearly violate legislative intent.²²⁵

220. For example, a statute providing that "all departments and establishments shall furnish to the Comptroller General such information . . . as he may . . . require of them," 31 U.S.C. § 54 (1970), has not prevented various agencies from denying information to the GAO. See notes 61, 65-66 *supra* and accompanying text.

221. 5 U.S.C.A. § 552 (Supp. Feb. 1975). For the history of the enactment of these amendments see text at notes 308-33 *infra*.

222. 5 U.S.C.A. § 552(b)(1) (Supp. Feb. 1975).

223. 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975). See text at notes 965-88 *infra*.

224. Federal courts will refuse to hear cases involving "political" questions. *Gilligan v. Morgan*, 413 U.S. 1 (1973); *Baker v. Carr*, 369 U.S. 186 (1963). In *Baker*, the test for a political question was said to be

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Courts could find that they lack "judicially discoverable and manageable standards" for resolving executive-public, or executive-congressional, struggles over information.

225. See H.R. REP. NO. 93-1380, 93d Cong., 2d Sess. 11-12 (1974) [hereinafter CONFERENCE REPORT].

The amendments also failed to create an active review mechanism. Finally, they address themselves only to eliminating wrongful classifications; they do not touch the problem of guaranteeing congressional access to correctly classified information.

Legislation introduced in the 93d Congress dealt with other aspects of this subject.²²⁶ As introduced, the bill would have provided a statutory basis for the security classification system. The bill's main innovation was a nine-member Classification Review Commission.²²⁷ The President would appoint its members, but six would have to be selected from lists drawn up by the Speaker of the House and the President pro tempore of the Senate.²²⁸ The bill gave the Commission plenary authority to prescribe governing regulations²²⁹ and institute sanctions for their violation.²³⁰ The Commission was also empowered to investigate charges of improper classification,²³¹ and the bill gave it subpoena power for this purpose.²³² Finally, the bill authorized the Commission to resolve controversies engendered by executive refusals to supply classified information requested by Congress, a congressional committee, or a subcommittee.²³³ The Commission's decision in such a case would be reviewable by the United States Court of Appeals for the District of Columbia, with an appeal of right to the Supreme Court.²³⁴

The bill restricted classification authority to designated agencies, excluding some that currently possess that power. It also set limits on the distribution of such authority within agencies.²³⁵ The bill continued the use of Top Secret, Secret, and Confidential security classifications, defining them in terms of "exceptionally grave damage," "serious damage," and "damage" to the national defense of the United States.²³⁶

226. H.R. 12004, 93d Cong., 1st Sess. (1973).

227. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed §§ (f)(1), (2)) (1973).

228. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed § (f)(2)(A)) (1973).

229. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed § (f)(5)) (1973).

230. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed § (d)(5)(C)) (1973).

231. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed § (f)(6)(H)) (1973).

232. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed § (f)(6)(C)) (1973).

233. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed §§ (g)(1)-(7)) (1973).

234. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed §§ (g)(8)(A), (B)) (1973).

235. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed § (d)(2)(A)) (1973). This section limits Top Secret authority to the Departments of State, Defense, Army, Navy, and Air Force, the CIA, the Atomic Energy Commission, and offices within the Executive Office of the President designated by the President. Secret authority is given to the agencies with Top Secret authority, plus the Departments of Justice, Transportation, and the Treasury. Confidential authority goes to the agencies with Secret authority, plus the Department of Commerce and the National Aeronautics and Space Administration. Although they have national security responsibilities, the United States Information Agency and the Arms Control and Disarmament Agency are not given any classification authority.

236. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed § (d)(1)) (1973).

Under the bill, each grade of classified information would be downgraded to the next lowest level after twelve months.²³⁷ It provided that only Top Secret information could be exempted from automatic declassification, and then only if such information (1) was specifically exempted from disclosure by statute; (2) pertained to cryptography; (3) revealed intelligence sources or methods; or (4) disclosed a "specific defense matter, the continuing protection of which is of vital importance to the United States"²³⁸ Exempt status could be conferred only by vote of the Commission; the protection could last up to six years if, at stated intervals, the Commission voted to continue it.²³⁹ Exemption beyond six years would have been possible only when the President justified the exemption in writing and the Commission did not override his or her justification.²⁴⁰

The proposed bill had a number of positive aspects. It affirmed Congress' authority to set the information policy of the federal government. It addressed only the classification issue, and hence did not weaken its effectiveness by attempting to deal with and define executively privileged information, a category requiring a special approach.²⁴¹ And it provided for a genuinely independent reviewing body that would be able to devote itself solely to matters of classification and thus develop the expertise needed to resolve challenges to particular classifications.²⁴²

237. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed § (e)(2)) (1973).

238. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed § (e)(3)) (1973).

239. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed § (e)(4)(B)) (1973).

240. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed § (e)(4)(B)) (1973).

241. See text at notes 262-307 *infra*.

242. There are four possible objections to such a commission. In the first place, that body will be deeply involved in the work of the executive branch; indeed, it will promulgate regulations governing important elements of the executive's responsibilities. If the President in fact possesses the authority to prevent the dissemination of information, then it could be argued that a nonexecutive body cannot be given exclusive control over information policy. The response to this is that Congress has responsibilities in the field of information equal to those of the President. This follows from Justice White's suggestion in *Mink* that Congress was not compelled to include in the national security exemption of the FOIA everything that is classified by the executive. See text at note 204 *supra*. If Congress need not accept an executive determination that release of particular information would damage the nation, it is arguable that Congress need not leave this determination to the executive at all. Rather, Congress may make the determination itself or may establish an agency like the Classification Review Commission as a "necessary and proper" means of meeting its responsibilities. Of course, the Commission would have no authority over executively privileged materials, as the withholding of these materials does not rest solely on security classification. See text at notes 262-307 *infra*.

One might also object to the commission on the ground that it may acquire excessive power over information. But this seems unlikely. In the first place, if its function of arbitrating between Congress and the executive were eliminated, see text at notes 255-57 *infra*, it could not interfere directly with congressional acquisition of data.

There were, however, serious flaws in the bill. First, the bill's provision limiting the President's power to select Commission members by requiring that he choose some members from lists proposed by particular legislators may have been unconstitutional. The Constitution gives the President the power, with the advice and consent of the Senate, to "appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."²⁴³ By permitting the Speaker of the House and the President pro tempore of the Senate to limit the President's choice of members for the Classification Review Commission, the bill in effect vested these two persons with a portion of the appointment power. This procedure may be justified only on the theory that, since control of national security information falls within the jurisdiction of both the executive and legislative branches,²⁴⁴ each may play a role in selecting the persons supervising the process. However, it is not clear that Congress can arrogate to itself a segment of the constitutional power to appoint certain "officers of the United States" merely because such officers would be performing partially legislative duties.

Second, limiting classification to "national defense" matters²⁴⁵ may have invited defiance of the bill. Ongoing diplomatic negotiations, for example, need not have any connection with defense matters. Yet revealing the substance of such negotiations could occasionally damage the national interest. Bureaucrats dealing with sensitive nonmilitary matters may thus have been forced either to ignore the "defense" limitation or to interpret "defense" in a way that did not limit the classification decision. It would be more sensible to have included a classification provision that paralleled the

Moreover, if it attempted to classify too much material, the same mechanisms that bring facts to light under the current system would work against it.

It can also be argued that such a body may be co-opted and so lose its effectiveness as a watchdog. This is a risk that must be run; every independent regulatory body faces such a threat. The mere possibility of co-optation is not sufficient reason to abandon the idea, however, at least in the absence of a substitute proposal.

Finally, one may contend that the expense of such a body would be prohibitive. But this need not be the case. The commission would be required to do no more than write regulations and perform spot checks on classifying agencies. A staff of three or four hundred would probably suffice for these purposes. The concept of the Classification Review Commission, in short, seems strong enough to meet the principal objections to it.

243. U.S. CONSR. art. II, § 2, cl. 2.

244. See text at notes 160-214 *supra*.

245. See text at note 236 *supra*.

"national defense or foreign policy" exemption of the Freedom of Information Act.²⁴⁶

Third, the bill's limitations on classification authority²⁴⁷ seemed unrealistic. Agencies that are closely involved in national security matters, such as the Arms Control and Disarmament Agency, were not accorded needed classification authority. And the attempt to restrict classification authority to persons ranking no lower than section chief may have proved ineffective. The authorized classifier may actually do no more than accept the classification assigned by whoever prepared the document. Indeed, this would have been more likely to occur under the new bill than under the current system,²⁴⁸ since the bill restricted classification to a higher level than does the E.O., and hence would have increased the quantity of classifiable material with which each classifier must deal.

Fourth, the time periods for which classifications are effective²⁴⁹ were shorter than seems prudent. There will be some Top Secret, Secret and Confidential documents that may safely be disclosed after thirty-six, twenty-four or twelve months, but there will be others that cannot.²⁵⁰ Indeed, this section of the bill seemed to confuse the problem of improper classification with that of duration of classification. If the classification system is reorganized so that the only items classified are those that ought to be, then it makes no sense to limit arbitrarily the protection afforded classified material.

Fifth, the bill's provisions for exempting material from automatic declassification²⁵¹ were overly restrictive and probably unworkable. Because the bill assumed that all non-Top Secret material can be revealed after a specific period of time, it encouraged classifiers to overuse the Top Secret designation. And the bill's exemption categories were inadequate. For example, the bill eliminated the E.O.'s exemptions for material supplied in confidence by foreign governments and material that could place a person in immediate jeopardy. Yet, these categories are among the most appropriate for exemption from automatic disclosure.²⁵² Furthermore, the exemption

246. 5 U.S.C.A. § 552(b)(1) (Supp. Feb. 1975). See text at notes 506-35 *infra*.

247. See note 235 *supra* and accompanying text.

248. See text at notes 46-49 *supra*.

249. See text at notes 237-40 *supra*.

250. For example, an analysis of methods of jamming an item of electronic equipment commonly used by our armed forces would not necessarily rate a Top Secret classification, but would nevertheless require protection for as long as the item was used by the military.

251. See text at note 238 *supra*.

252. It may be argued that both types of material actually fit within the bill's exemption categories. However, while disclosures likely to endanger an individual or to divulge information supplied by foreign governments will very often also reveal "intelligence sources or methods" and thus come within the bill's third exemption, see text at note 238 *supra*, it is difficult to believe that this will be true in every case.

procedure, requiring a Commission vote on each document,²⁵³ was extremely cumbersome. The United States government generates more than 4 million classified documents a year.²⁵⁴ About half of these are currently exempted from automatic declassification. It would be physically impossible for agency heads, the President, and the Commission to evaluate the need for exemption in 2 million cases. It may be that the authors of the bill intended to make the procedure so unwieldy that agencies would not make use of exemptions. But the quantity of material legitimately qualifying for exemption under any system will be relatively large, even if only reports from CIA operatives, weapons secrets, and cryptographic materials are considered. The system established by the new bill could not have handled the number of appropriate requests it could have been expected to receive.

The final and most serious defect in the proposed bill was the provision making the Commission and the courts the arbiters of disputes between Congress and the President.²⁵⁵ The bill charged the Commission with resolving such disputes through "weigh[ing] the constitutional rights and powers of the parties concerned, including (i) the extent to which such information is necessary to Congress so that Congress may fully and properly discharge its Constitutional responsibilities and (ii) the extent to which the disclosure of such information to Congress would be contrary to the public interest or would seriously endanger the national defense of the United States."²⁵⁶ Thus, the Commission was given the power to determine what the Congress needs to discharge its duties properly. This is, in effect, an admission by Congress that its right to information is limited. If Congress accepted a Commission determination that certain information was not "necessary to Congress," Congress apparently would be conceding that there are categories of information that it has no right to demand. Surely it is unwise for the Congress itself to acknowledge limitations on its power in this area.

Furthermore, the establishment of this procedure amounts to congressional buck-passing. Giving another body the obligation to adjudicate conflicts over the release of information frees Congress

The only way to be certain that such items would be covered would be to bring them within the fourth exemption, which extends to "specific defense material[s], the continuing protection of which is of vital importance to the United States." See text at note 238 *supra*. But "defense" matters of "vital importance" must be interpreted as including almost anything relating to national security if *all* information supplied by foreign governments or endangering individuals is to be covered by this exemption. Such an interpretation probably would turn the fourth exemption into a catch-all, applicable to anything.

253. See text at note 239 *supra*.

254. See note 2 *supra* and accompanying text.

255. See text at notes 233-34 *supra*.

256. H.R. 12004, 93d Cong., 1st Sess. § 3 (proposed § (g)(5)(B)) (1973).

from the responsibility of determining for itself whether the public interest would be served by the information's release. But Congress ought not to dodge decisions of this kind. There can be no substitute for a congressional determination to assert the legislature's right to information through the use of law-making and fiscal powers. Indeed, this may be the only constitutional way for Congress to obtain classified information, since the political question doctrine may well prevent judicial intervention.²⁵⁷

As well as containing several questionable provisions, the bill failed to consider two important elements of a classification system. First, it neglected the interests of foreign states that entrust the United States with their secrets.²⁵⁸ Second, it failed to provide a method of informing Congress of the existence of information.

For all of these reasons, it is perhaps fortunate that the bill was not enacted as drafted. A workable classification system could be launched, however, by enacting the proposed bill shorn of its objectionable features. The bill's major faults would be eliminated by allowing the Classification Review Commission to regulate the distribution of classification authority and the duration of classified status. That body should be able to prescribe regulations sufficiently sophisticated to permit appropriate mixes of authority. It could take into account differences in the circumstances of different classifiers and in the natures of the various sorts of classified material, an approach foreclosed by the bill's simplistic procedures.

But still more legislation would be needed. Ideally, such legislation would provide that (1) except as otherwise stated, all government information is to be made available to the public; (2) information meeting criteria of "sensitivity" established by the Classification Review Commission can be withheld; (3) information relating to certain kinds of activities (for example, agreements to provide United States resources to foreign states, or the commitment of American troops to combat) may not be considered "sensitive"; and (4) Congress will establish procedures for safeguarding information.

Legislation of this kind will provide for publicization of important information. By defining what could be properly withheld and by specifying what had to be disclosed, the statute might aid the courts in dealing with the problems they face in declassification suits. In addition, establishing categories of information required to be disclosed might effect agency routinization of information-release procedures. Currently, the only routines affecting day-to-day information policy involve concealment by means of classification. Finally, provision for secure storage facilities should reduce congressional reluctance to ask for classified information, as legislators would

257. See note 224 *supra*.

258. See note 252 *supra*.

have less reason to fear being held responsible for breaches of security.

While such measures would go far toward preventing wrongful classification, they are of less use in informing Congress of the existence of properly classified information. One proposed step toward keeping Congress informed is the rewriting of the CIA's charter to permit Congress to seek information directly from that agency.²⁵⁹ If this were done, Congress could avail itself of an intelligence source of acknowledged accuracy,²⁶⁰ and would have an institutionalized procedure for information-gathering in contrast to its current reliance on leaks and executive largess. This system would not inform Congress about the activities of other executive branch agencies, however, and ignorance of these activities often has harmed Congress. Also, the CIA is an executive agency, and might well obey a presidential order that conflicted with a congressional request. Nevertheless, this modification would increase the amount of information that Congress automatically and directly receives and would thereby facilitate congressional discovery of appropriate subjects for inquiry.²⁶¹

In summary, it may be said that the differences between the two types of access problems call for different solutions. Elimination of improper classification to increase public access involves, essentially, changes in procedure. Such changes may be instituted in a fairly straightforward manner. On the other hand, increasing the flow of information to Congress requires a change in attitude on the part of members of the legislature. If legislators demonstrate that they are responsible and determined to enforce their rights, the public will support them and the executive is not likely to deceive them. If, on the other hand, they shy away from the difficulties inherent in obtaining information from a reluctant source, their ignorance will continue no matter what changes in law they effect.

B. *Executive Privilege*

The doctrine of executive privilege gives the executive branch the power in certain cases to withhold information from the Congress, the judiciary, and the public.²⁶² Recognition of executive privilege

259. *Government Secrecy Hearings*, *supra* note 4, at 19-23 (testimony of M. Bundy).

260. *Id.* at 20.

261. Enlargement of congressional staffs and congressional use of data-processing equipment would also help to achieve this goal.

262. *Freedom of Information and Secrecy in Government, Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess. 271 (1958) [hereinafter *1958 Senate Hearings*] (Memorandum of the Attorney General, *The Power of the President To Withhold Information from Congress*). The Attorney General argued, "Courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest . . ." *Id.* at 272. This view was reaffirmed by Attorney General Kleindienst in 1973, when he informed a Senate subcommittee that

substantially predates the establishment of the classification system,²⁶³ and it has been suggested that the doctrine provides the executive branch with a more potent withholding power than does that system.²⁶⁴ Furthermore, executive privilege probably can be invoked as a defense to a request for information under the Freedom of Information Act, even if none of that Act's exemptions apply.²⁶⁵ Thus, this brief examination of the doctrine of executive privilege is intended both to supplement the preceding section on the classification system, and to serve as an introduction to the discussion of the FOIA that follows.

1. *The Basis of the Privilege*

Depending on the circumstances in which the claim of executive privilege is raised, it can be premised either on the common law or on the constitutional principle of separation of powers.²⁶⁶ The common-law privilege is an evidentiary privilege; it can be raised only in a judicial setting. The constitutionally based executive privilege, on the other hand, may be asserted in a broad range of settings and has been invoked to deny information to the courts,²⁶⁷ to Congress,²⁶⁸ and to the public.²⁶⁹

"[t]he doctrine of executive privilege denotes the constitutional authority of the President in his discretion to withhold certain documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the Government, if he believes disclosure would impair the proper exercise of his constitutional functions." 1 1973 Senate Hearings, *supra* note 125, at 20.

263. *Government Information Hearings*, *supra* note 61, at 384 (testimony of W. Rehnquist, Assistant Attorney General).

264. "Related to the doctrine of executive privilege, but by no means co-extensive with it, is the classification of material in the possession of the executive branch under the provisions of executive orders But the mere fact of classification by itself, of course, does not constitute a sufficient basis for withholding information from a committee of Congress" *Id.* at 359. The doctrine of executive privilege apparently would allow such withholding.

265. See text at notes 298-306 *infra*; K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.3 (Supp. 1970).

266. *Nixon v. Sirica*, 487 F.2d 700, 763 (D.C. Cir. 1973) (Wilkey, J., dissenting). The doctrine of executive privilege has also been said to rest on the constitutional notion of implied executive powers. "The Constitution does not expressly confer upon the Executive any such privilege [T]he executive authority [is] implicit, rather than expressed, in the basic charter." *Executive Privilege: The Withholding of Information by the Executive, Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 421 (1971) (testimony of W. Rehnquist, Assistant Attorney General) [hereinafter 1971 Senate Hearings].

267. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973). For extensive commentaries on *United States v. Nixon*, see Symposium, *supra* note 206.

268. See, e.g., the following statement of former Assistant Attorney General Rehnquist: "The doctrine of executive privilege, as I understand it, defines the constitutional authority of the President to withhold documents or information in his possession

While courts²⁷⁰ and commentators²⁷¹ have long recognized the common-law evidentiary privilege, the validity of the claimed constitutional privilege has been challenged.²⁷² Advocates of the constitutional doctrine support their position by pointing to past congressional actions that impliedly recognized the doctrine,²⁷³ past presidential refusals to deliver information requested by Congress,²⁷⁴ and past disputes over information that have arisen between the courts and the executive branch.²⁷⁵ Professor Berger has ques-

or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the Government." 1971 *Senate Hearings*, *supra* note 266, at 421. The first unequivocal assertion by a President of this power occurred in 1835, when Andrew Jackson rejected a request for information made during the confirmation hearing of one of his nominees. Dorsen & Shattuck, *Executive Privilege, The Congress and the Courts*, 35 OHIO ST. L.J. 1, 12 (1974). In 1954, President Eisenhower ushered in the modern era of the use of executive privilege, *see* R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 163-208 (1974), by refusing to turn over information requested by Congress for use in the McCarthy-Stevens investigations. *Nixon v. Sirica*, 487 F.2d 700, 737 (D.C. Cir. 1973) (MacKinnon, J., concurring and dissenting).

269. One congressional report states that executive privilege was asserted to deny reporters access to a federal agency report on a local Kentucky jail and to withhold from private citizens records of the farm crop support programs. H.R. REP. NO. 86-2084, 86th Cong., 2d Sess. 36-37 (1960).

270. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1 (1953); *Scher v. United States*, 305 U.S. 251 (1938); *Hurst v. United States*, 344 F.2d 327 (9th Cir. 1965); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *affd. sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

271. *See* C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* §§ 106-13 (2d ed. E. Cleary 1972); 8 J. WIGMORE, *EVIDENCE* §§ 2367-79 (McNaughton rev. ed. 1961); 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2019 (1970).

272. *See* R. BERGER, *supra* note 268.

273. One example of congressional recognition of the doctrine of executive privilege involves the creation of the Department of Foreign Affairs. The Continental Congress had established such a department and had passed a resolution providing that the department would be headed by a congressionally appointed officer. (This resolution is quoted at 1 Stat. 28 (1789).) The resolution further specified that this officer was required to take custody of the books, records, and papers relating to his department, and that any member of Congress would have access to these materials. In 1789, after the enactment of the Constitution, the First Congress re-established the Department of Foreign Affairs. Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28 (1789). Nothing was said in the new act concerning Congress' right of access to departmental papers, however. Former Deputy Attorney General Rogers has taken this to mean that "Congress meant to give no power to the Congress to see secret data in the executive department against the wishes of the President. That was a power which the Continental Congress had and which the framers of the Constitution meant for the new Congress, created by the Constitution, not to have." 1958 *Senate Hearings*, *supra* note 262, at 9-10.

274. A list of such refusals can be found in *Nixon v. Sirica*, 487 F.2d 700, 732 n.9 (D.C. Cir. 1973) (MacKinnon, J., concurring and dissenting). The Attorney General has cited these refusals as support for a constitutionally based privilege, 1958 *Senate Hearings*, *supra* note 262, at 271, as have the dissenting judges in *Nixon v. Sirica*, 487 F.2d at 731-37 (MacKinnon, J.); 487 F.2d at 778-81 (Wilkey, J.).

275. The cases usually cited are *Marbury v. Madison*, 5 U.S. 137 (1803), which defined "the limits at which a court must stop when the head of a department invokes the privilege that the information sought from him is confidential and cannot be disclosed," *Wolkinson, Demands of Congressional Committees for Executive Papers*, 10

tioned whether these precedents establish a constitutional privilege.²⁷⁶ He points out that in some of the cases, the President eventually acquiesced in the congressional or judicial demands²⁷⁷ and in other instances the presidential decision to withhold information was made with the express permission of Congress.²⁷⁸ Nevertheless, there are many examples of presidential withholding of information that remain unaffected by these criticisms²⁷⁹ and firmly support the existence of a constitutionally based privilege.

2. *The Scope of the Privilege*

The common-law privilege traditionally has extended to secrets of state,²⁸⁰ identity of informers,²⁸¹ and some agency internal-communications.²⁸² The scope of the constitutional privilege appears to be coextensive with that of the common-law privilege; its boundaries are imprecise however, since it has been defined by executive use rather than by judicial theory. Former Attorney General Kleindienst has claimed that the constitutional privilege applies to information dealing with foreign relations and military affairs, internal communications between advisers and the President, and investigative re-

FED. B.J. 103, 224 (1949), and *United States v. Burr*, 25 Fed. Cas. 30 (No. 14692d) (C.C. Va. 1807), in which a federal court issued a subpoena duces tecum directing the President to produce documents.

276. R. BERGER, *supra* note 268, at 163-208.

277. *Id.* at 167-71, 187-91.

278. *Id.* at 179-81. Professor Berger concludes that instances of presidential withholding of information with the permission of Congress do not support a presidential right to withhold information without the permission of Congress. However, congressional permission for withholding information can be viewed as a *recognition* by Congress of a constitutional executive privilege.

279. Even Professor Berger admits that at least one of these presidential actions was "clearly wrong." *Id.* at 182.

280. *See, e.g., United States v. Reynolds*, 345 U.S. 1 (1953).

281. *See, e.g., Scher v. United States*, 305 U.S. 251, 254 (1938); *In re Quarles & Butler*, 158 U.S. 532, 535-36 (1894) (dictum); *Hurst v. United States*, 344 F.2d 327, 328 (9th Cir. 1965). It is not clear whether this privilege extends to the informer's statements as well as to his identity. Compare C. McCORMICK, *supra* note 271, § 111 (courts are split on the extent of the informer's privilege) with 8 J. WIGMORE, *supra* note 271, § 2374, at 765 (privilege extends only to the informer's identity).

282. 8 J. WIGMORE, *supra* note 271, § 2378, at 805. The leading case seems to be *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *affd. sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967). The parameters of the common-law evidentiary privilege are discussed in C. McCORMICK, *supra* note 271, §§ 106-13; 8 J. WIGMORE, *supra*, §§ 2367-79; 8 C. WRIGHT & A. MILLER, *supra* note 271, § 2019; Engel, *Introduction: Information Disclosure Policies and Practices of Federal Administrative Agencies*, 68 NW. U. L. REV. 184, 185-87 (1973); and Note, *The Doctrine of Executive Privilege Limits Statutory Access to Information Held Within the Executive Office of the President*, 49 TEXAS L. REV. 780, 781-85 (1971). (But note that some of the discussion in this Note is mooted by the subsequent reversal of *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).)

ports.²⁸³ His statement is the most recent expression of the executive's view of the scope of the privilege.

In order to determine whether a claim of common-law executive privilege is "appropriate," courts balance the government interest in confidentiality against the public interest in disclosure.²⁸⁴ The greater the need the seeker has for the information, the more thorough the court's investigation is of the appropriateness of the claim.²⁸⁵ And the seeker's chances of prevailing on the privilege issue depend on whether the action is civil or criminal,²⁸⁶ and whether the seeker is a prosecutor, a plaintiff or a defendant.²⁸⁷

In determining whether the executive can validly withhold information under a claim of constitutionally based executive privilege, the courts again appear to focus on the executive's need for confidentiality, the seeker's need for the information withheld, and the identity of the seeker. Three recent cases involving claims of executive privilege, *United States v. Nixon*,²⁸⁸ *Senate Select Committee on Presidential Campaign Activities v. Nixon*,²⁸⁹ and *Nixon v. Sirica*,²⁹⁰ illustrate the judicial reasoning in this area.

United States v. Nixon involved presidential resistance to a subpoena duces tecum requiring the executive to produce certain tape recordings and documents relating to conversations between President Nixon and his advisers. These materials were needed by the Justice Department for use in criminal proceedings. The Supreme Court held that, although communications between high-level executive branch officials are "presumptively" privileged,²⁹¹ the presumption was rebutted in this case by the public interest in the fair administration of criminal justice, an interest that could be furthered only by disclosure.²⁹² In dicta, the Court noted that the conversations in question were nonmilitary, and implied that the presumption would be stronger where military matters were concerned.²⁹³ Presumably this is true because of the greater need for executive confidentiality in the military area.

283. 1 1973 *Senate Hearings*, *supra* note 125, at 21-23.

284. *United States v. Reynolds*, 345 U.S. 1, 11 (1953). This is also the procedure when a constitutional privilege is asserted. *United States v. Nixon*, 418 U.S. 683, 711-12 (1974).

285. *United States v. Reynolds*, 345 U.S. 1, 11 (1953). *Cf. Nixon v. Sirica*, 487 F.2d 700, 754 (D.C. Cir. 1973) (MacKinnon, J., concurring and dissenting).

286. 8 C. WRIGHT & A. MILLER, *supra* note 271, § 2019, at 156.

287. *EPA v. Mink*, 410 U.S. 73, 86 (1973).

288. 418 U.S. 683 (1974).

289. 498 F.2d 725 (D.C. Cir. 1974).

290. 487 F.2d 700 (D.C. Cir. 1973).

291. 418 U.S. at 713.

292. 418 U.S. at 713.

293. 418 U.S. at 683, 710.

In *Senate Select Committee on Presidential Campaign Activities*, the Court of Appeals for the District of Columbia upheld the presidential claim of privilege concerning a similar group of tapes. The court reasoned that the need of the Senate committee seeking the tapes was "too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena."²⁹⁴ In *Nixon v. Sirica*,²⁹⁵ an earlier case brought by the Special Prosecutor for these same materials, the court had ordered disclosure. The difference in results can be attributed to the different purposes that the two plaintiffs were seeking to accomplish and to the greater importance that the requested information had for one function than for the other. In *Nixon v. Sirica* the court noted that "the Special Prosecutor has made a strong showing that the subpoenaed tapes contain evidence peculiarly necessary to the carrying out of" the grand jury's judicial function.²⁹⁶ In the *Select Committee* case, the court stated that the Committee "points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes"²⁹⁷

3. Executive Privilege and the FOIA

The FOIA provides that upon request, government agencies are to make available agency records not otherwise specifically exempted from disclosure by the Act.²⁹⁸ The success of the FOIA in ensuring public access to information held by the executive branch depends not only on the provisions of the FOIA itself, but also on the possible constraints on access imposed by the doctrine of executive privilege.

Certain aspects of the doctrine of executive privilege have been incorporated into the FOIA exemptions. For example, the first exemption allows the withholding of information "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" that is in fact "properly classified" pursuant to such an order.²⁹⁹ This exemption embodies the privilege for state secrets.³⁰⁰ The fifth

294. 498 F.2d at 733. The court's conclusion was based on the fact that the House Judiciary Committee already had copies of each of the subpoenaed tapes and the legislative process did not require the exact text of the oral statements in their original form. 498 F.2d at 732.

295. 487 F.2d 700 (D.C. Cir. 1973).

296. 487 F.2d at 717.

297. 498 F.2d at 733.

298. 5 U.S.C.A. § 552(a)(3) (Supp. Feb. 1975).

299. 5 U.S.C.A. § 552(b)(1) (Supp. Feb. 1975).

300. C. McCORMICK, *supra* note 271, § 108, at 233; Note, *supra* note 282, at 786.

exemption³⁰¹ incorporates the evidentiary privilege for intra-agency and inter-agency advisory opinions.³⁰² Finally, the seventh exemption permits the withholding of "investigatory records compiled for law enforcement purposes," but only if producing those records would, *inter alia*, "disclose the identity of a confidential source"³⁰³ This exemption thus incorporates the evidentiary executive privilege for identity for informers.

Despite the apparent congressional attempt to exempt from automatic disclosure information traditionally covered by the privilege, there is still the possibility that the FOIA and the doctrine of executive privilege will conflict in that material required to be disclosed by the FOIA will be withheld under a claim of executive privilege. This situation could arise if, for example, a court ordered the disclosure of a particular piece of national security information found not to be "properly classifiable" pursuant to executive order. In such a case, the executive might still claim a right to withhold the information.³⁰⁴

Whether the doctrine of executive privilege can be used to defeat a congressionally mandated disclosure depends on the validity of the doctrine's claimed constitutional foundation. If the doctrine is in fact purely evidentiary, then the FOIA exemptions can be viewed as its congressional codification. Any information not covered by the exemptions would thus not be subject to a claim of executive privilege. If "the doctrine . . . is to some degree inherent in the constitutional requirement of separation of powers,"³⁰⁵ however, then "[s]erious constitutional questions would be presented by a claim of executive privilege as a defense to a suit under the Freedom of Information Act"³⁰⁶ This is so because the separation of powers

301. 5 U.S.C. § 552(b)(5) (1970).

302. *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4496 (U.S. April 28, 1975); *Renegotiation Bd. v. Grumman Aircraft Engr. Corp.*, 43 U.S.L.W. 4502, 4507 (U.S. April 28, 1975); *EPA v. Mink*, 410 U.S. 73, 86 (1973).

303. 5 U.S.C.A. § 552(b)(7) (Supp. Feb. 1975).

304. This hypothetical assumes an executive order that is narrower in scope than the doctrine of executive privilege. It is probably more realistic to assume that any executive order dealing with classification would be broadly drawn. *See, e.g.*, Exec. Order 11652 § 1(c), 3 C.F.R. 340 (1974) (classification under a designation of "Confidential" is proper if the information's "unauthorized disclosure could reasonably be expected to cause damage to the national security"). If the executive order is in fact broader in scope than the doctrine of executive privilege, the FOIA would permit withholding pursuant to the order. 5 U.S.C.A. § 552(b)(1) (Supp. Feb. 1975). That Act does not provide the public with a means of challenging the order itself.

305. *Soucie v. David*, 448 F.2d 1067, 1071 n.9 (D.C. Cir. 1971).

306. *Soucie v. David*, 448 F.2d 1067, 1071 (D.C. Cir. 1971). In *Soucie*, two citizens brought suit under the FOIA to compel the Office of Science and Technology to release a report evaluating the government's supersonic transport aircraft program. The district court held that the doctrine of executive privilege protected the report from disclosure. The Circuit Court for the District of Columbia declined to reach the

requirement would preclude congressional access to executively privileged information, and "Congress could not surmount constitutional barriers . . . by conferring upon any member of the general public a right which Congress, neither individually nor collectively, possesses."³⁰⁷ If, for example, the constitutional doctrine is found to extend to state secrets, and if a particular piece of information not properly classifiable is nevertheless found to be a "state secret," executive withholding of the information would be permissible under a claim of executive privilege. Thus, until the constitutional underpinnings of the doctrine of executive privilege are fully articulated, and until its precise scope is defined the probable outcome of any clash between the FOIA and the doctrine is unpredictable.

C. *The Freedom of Information Act*

The Freedom of Information Act establishes regular channels for public access to government information. Enacted in 1966³⁰⁸ in the belief that, "[i]f government is to be truly of, by, and for the people, the people must know in detail the activities of government,"³⁰⁹ the FOIA was intended to create a government information system with a clear presumption in favor of openness;³¹⁰ it states that all "reasonably described" executive branch materials are to be made available to the public,³¹¹ unless specifically exempted by any of the nine stated exceptions to the Act.³¹²

"constitutional issues" inherent in the executive privilege question, as "the privilege was not expressly invoked by the Government, and therefore, . . . was not properly before the court." 448 F.2d at 1071 (footnote omitted).

307. *Soucie v. David*, 448 F.2d 1067, 1081 (D.C. Cir. 1971) (Wilkey, J., concurring).

308. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250 (codified at 5 U.S.C. § 552 (1970)).

309. UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT III (1967) [hereinafter ATTORNEY GENERAL'S MEMORANDUM].

310. See S. REP. NO. 89-813, 89th Cong., 1st Sess. 3 (1965); H.R. REP. NO. 89-1497, 89th Cong., 2d Sess. 1 (1966); ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at III.

311. 5 U.S.C.A. § 552(a)(3) (Supp. Feb. 1975). Prior to February 1975, only "identifiable" materials were subject to disclosure under the FOIA. 5 U.S.C. § 552(a)(3) (1970).

The Privacy Act of 1974, 5 U.S.C.A. § 552a (Supp. Feb. 1975), provides that an individual may obtain access to files of which he is the subject, and the Act establishes access procedures for this purpose. See text at notes 2055-106 *infra*. It can be argued that the Privacy Act unintentionally has amended parts of the FOIA. See text at notes 2196-211 *infra*.

312. 5 U.S.C.A. § 552(b) (Supp. Feb. 1975). It does appear, however, that executive privilege can be invoked by the government to deny a request for information made under the FOIA. The courts have not yet clearly decided whether the FOIA's exemptions and the doctrine of executive privilege are coterminous, but it has been implied that they are not. See, e.g., *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971): "[U]nless the Government on remand makes a valid claim of constitutional privilege,

Prior to the enactment of the FOIA, Congress had made several attempts to guarantee the public availability of government information. The first significant congressional action on the matter was the enactment in 1946 of section 3 of the Administrative Procedure Act (APA).³¹³ Section 3, however, proved to be ineffective.³¹⁴ Its major deficiency was that it made records available only "to persons properly and directly concerned," rather than to the general public.³¹⁵ Moreover, its exemptions for government functions "requiring secrecy in the public interest,"³¹⁶ and for adjudicatory final opinions and orders "required for good cause to be held confidential"³¹⁷ were vague and expansive. Finally, no judicial remedy was provided for the victims of wrongful nondisclosure.³¹⁸ Dissatisfaction with section 3 led to various attempts to amend or replace it.³¹⁹ Ultimately, section 3 was replaced with the FOIA.³²⁰ This new legislation was intended to reaffirm a general philosophy of full disclosure, to eliminate the vague phrases that plagued section 3 of the APA, and to provide for the enforcement of the disclosure provisions by the judiciary.³²¹

Despite its frequent use by the public,³²² commentators criticized the FOIA for being difficult to interpret,³²³ vague, and poorly

it will be able to prevent disclosure only by showing that the [document requested] falls within one or more of the statutory exemptions." See text at notes 262-307 *supra*.

313. Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238.

314. S. REP. NO. 89-813, *supra* note 310, at 5; H.R. REP. NO. 89-1497, *supra* note 310, at 5-6.

315. Act of June 11, 1946, ch. 324, § 3(c), 60 Stat. 238.

316. Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238.

317. Act of June 11, 1946, ch. 324, § 3(b), 60 Stat. 238.

318. S. REP. NO. 89-813, *supra* note 310, at 5.

319. For general discussions of the various congressional attempts to amend section 3, see FREEDOM OF INFORMATION CENTER, PUB. NO. 157, FEDERAL PUBLIC RECORDS LAW DEBATE II (1966); FREEDOM OF INFORMATION CENTER, REP. NO. 189, A HISTORY OF THE FEDERAL RECORDS LAW (1967); SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, S. DOC. NO. 93-82, 93d Cong., 2d Sess. 6-10 (1974) [hereinafter SOURCE BOOK]; Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 NOTRE DAME LAW. 417 (1965).

320. The FOIA became effective on July 4, 1967. Pub. L. No. 90-23, § 4, 81 Stat. 56.

321. S. REP. NO. 89-813, *supra* note 310, at 3.

322. In the first four years following the enactment of the FOIA, 112 cases were filed under it. FREEDOM OF INFORMATION CENTER, REPORT NO. 280, HOW THE COURTS HAVE HELD 2 (1972). By May 1973 the government had lost roughly half of the 200 cases argued under the Act. FREEDOM OF INFORMATION CENTER, REPORT NO. 318, TESTING THE FOI ACT 1 (1974). The 1974 FOIA source book discussed 88 FOIA opinions and listed another 84 FOIA cases being handled by the Civil Division of the Department of Justice as of January 1, 1974. SOURCE BOOK, *supra* note 319, at 116, 184.

323. For example, courts have had difficulty interpreting the investigatory files exemption, 5 U.S.C. § 552(b)(7), as amended, 5 U.S.C.A. § 552(b)(7) (Supp. Feb. 1975). See text at notes 749-75 *infra*.

drafted.³²⁴ Little legislative action was taken in response to these criticisms in the years immediately following the FOIA's enactment.³²⁵ However, after extensive hearings by its Subcommittee on

Inconsistencies in the congressional reports on the FOIA have contributed to the interpretation problems by making difficult any determination of legislative intent. SOURCE BOOK, *supra* note 319, at 8-9. The House report (H.R. REP. No. 89-1497, *supra* note 310) is more detailed than the Senate report (S. REP. No. 89-813, *supra* note 310) and is more inclined to limit the disclosure provisions. See K. DAVIS, *supra* note 265, § 3A.2 (Supp. 1970); *Getman v. NLRB*, 450 F.2d 670, 673 n.8 (D.C. Cir. 1971) ("[The House report] is characteristically broader and goes beyond the express terms of the statute"). When the reports conflict, most courts prefer to follow the Senate report. See, e.g., *Hawkes v. IRS*, 467 F.2d 787, 794 (6th Cir. 1972); *Getman v. NLRB*, 450 F.2d 670, 673 n.8 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1077 n.39 (D.C. Cir. 1971); *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1304 (D.D.C. 1973), *modified in part*, 505 F.2d 350 (D.C. Cir. 1974); *Stokes v. Hodgson*, 347 F. Supp. 1371, 1373 (N.D. Ga. 1972), *aff'd sub nom.* *Stokes v. Brennan*, 476 F.2d 699 (5th Cir. 1973); *Benson v. GSA*, 289 F. Supp. 590, 595 (W.D. Wash. 1968). It is argued that since the Senate report was before each house when the Act was passed, while the House report was not written until after the Senate had considered and passed its version of the bill, the Senate report is the more authoritative. K. DAVIS, *supra* note 265, § 3A.2, at 117 (Supp. 1970); Project, *Federal Administrative Law Developments—1971*, 1972 DUKE L.J. 115, 147; Note, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 153 (1969).

Two other possible interpretive sources of the FOIA deserve mention. These are the 1967 memorandum issued by the Attorney General's Office, advising executive agencies of their obligations under the new law, ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, and the agency regulations promulgated to enforce the mandates of the Act. See generally Project, *Federal Administrative Law Developments—1970*, 1971 DUKE L.J. 149, 166-71; Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO. L.J. 18, 47-49 (1967); Comment, *The 1966 Freedom of Information Act—Early Judicial Interpretations*, 44 WASH. L. REV. 641, 680-85 (1969). Both of these sources appear to be of limited value, however. The memorandum frequently follows the more restrictive House report in its resolution of statutory ambiguities and sometimes does not even discuss or note a conflicting Senate report provision. See, e.g., *Consumers Union of United States, Inc. v. Veterans Admn.*, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971) ("[t]he analysis of exemption (2) by the Attorney General fails to discuss the Senate Report"). See also Note, *The Investigative Files Exemption to the FOIA: The D.C. Circuit Abandons Bristol-Myers*, 42 GEO. WASH. L. REV. 869, 873 (1974). Furthermore, commentators have suggested that the memorandum is agency-biased. K. DAVIS, *supra* note 265, § 3A.1, at 115 (Supp. 1970) ("reflects the viewpoint of the agencies, all of whom opposed the enactment"); Note, 42 GEO. WASH. L. REV. 869, *supra*, at 873 n.29 ("self-serving"). The agency regulations are also likely to be nonobjective and hence should not be relied on heavily in interpreting the FOIA. But see Washington Research Project, *Inc. v. HEW*, 504 F.2d 238, 247 (D.C. Cir. 1974), *cert. denied*, 43 U.S.L.W. 3601 (U.S. May 12, 1975); *Grumman Aircraft Engr. Corp. v. Renegotiation Bd.*, 482 F.2d 710, 716 (D.C. Cir. 1973), *rev'd. on other grounds*, 43 U.S.L.W. 4502 (U.S. April 28, 1975).

324. See Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 745 (1975); K. DAVIS, *supra* note 265, § 3A.1 (Supp. 1970); Note, 56 GEO. L.J. 18, *supra* note 323, at 52.

325. In the 90th Congress, the only action taken was the enactment of Pub. L. No. 90-23, 81 Stat. 250 (1967), which "incorporate[d] into title 5 of the United States Code, without substantive change, the provisions of Public Law 89-487 [the original FOIA]" S. REP. No. 90-248, 90th Cong., 1st Sess. 3 (1967). No other bills were introduced regarding the FOIA, although two committee reports compiled agency

Foreign Operations and Government Information,³²⁶ the House Committee on Government Operations published a report in 1972 that criticized the drafting of the Act.³²⁷ The report was particularly critical of the frequent withholding of records found not to be "identifiable," of agency delay in responding to requests and in filing responsive pleadings in FOIA lawsuits, of the lack of agency reporting to Congress, and of agency misuse of the Act's exemptions.³²⁸ The movement to rectify such deficiencies culminated in the congressional approval of seventeen amendments to the FOIA in early October 1974.³²⁹ President Ford vetoed the amendments on October 17, 1974,³³⁰ but Congress overrode the veto in November 1974.³³¹ The amendments became effective on February 19, 1975.³³²

This section will survey and discuss the administration of the FOIA. The requirements of government disclosure and the permissible exemptions from disclosure will be examined. The procedural aspects of the FOIA and its provisions for judicial enforcement will also be considered. Finally, an attempt will be made to analyze two problems that courts have faced in FOIA actions: whether a court may exercise its equity powers to order that information be with-

regulations implementing the FOIA: SUBCOMM. ON FOREIGN OPERATIONS AND GOVERNMENT INFORMATION OF THE HOUSE COMM. ON GOVERNMENT OPERATIONS, 90TH CONG., 2D SESS., FREEDOM OF INFORMATION ACT (COMPILATION AND ANALYSIS OF DEPARTMENTAL REGULATIONS IMPLEMENTING 5 U.S.C. 552) (Comm. Print 1968); SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 90TH CONG., 2D SESS., THE FREEDOM OF INFORMATION ACT (TEN-MONTHS REVIEW) (Comm. Print 1968).

No bills regarding the implementation of the FOIA were introduced in the 91st Congress; however, the Senate Subcommittee on Administrative Practice and Procedure submitted a questionnaire concerning implementation of the FOIA to nearly all federal agencies, requesting copies of their FOIA regulations and decisions and detailed accounts of their public information policies. S. REP. NO. 91-1221, 91st Cong., 2d Sess. 2-3 (1970). The results of this effort were never published. *Id.*

326. *U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act, Hearings Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess., pts. 4-6 (1972) [hereinafter 1972 House Hearings].

327. H.R. REP. NO. 92-1419, 92d Cong., 2d Sess. 10-11 (1972).

The report also found that the Act was poorly administered; it criticized the inadequacy of agency regulations and records of requests, the lack of advisory leadership, agency failure to use public information officials, the insufficient orientation of agency employees, and the excessive fees charged by the agencies for search and reproduction. *Id.* at 9-10.

328. H.R. REP. NO. 92-1419, *supra* note 327, at 10-11.

329. 120 CONG. REC. S17,971-72 (daily ed. Oct. 1, 1974); 120 CONG. REC. H10,001-09 (daily ed. Oct. 7, 1974). See generally H.R. REP. NO. 93-876, 93d Cong., 2d Sess. (1974); S. REP. NO. 93-854, 93d Cong., 2d Sess. (1974); CONFERENCE REPORT, *supra* note 225.

330. 10 WEEKLY COMP. OF PRES. DOCS. 1318 (1974).

331. 120 CONG. REC. S19,806-23 (daily ed. Nov. 21, 1974).

332. "The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act." Act of Nov. 21, 1974, Pub. L. No. 93-502, § 4, 88 Stat. 1561.

held, and whether the Act's exemption provisions are mandatory or permissive.³³³

1. *The Definition of "Agency"*

The disclosure requirements of the FOIA apply to "each [government] agency."³³⁴ The FOIA is in fact a section of the APA;³³⁵ the APA defines an agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency"³³⁶ The original FOIA simply incorporated this definition.³³⁷ The 1974 FOIA Amendments have expanded on it: for the purposes of the FOIA, the term "agency" now expressly includes executive departments, military departments, government corporations, government controlled corporations, and independent regulatory agencies.³³⁸ Thus, the traditional notion of

333. For other extensive analyses of the FOIA see K. DAVIS, *supra* note 265, §§ 3A.01-.34 (Supp. 1970); Katz, *Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261 (1970); Koch, *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 MD. L. REV. 189 (1972); Kramer & Weinberg, *The Freedom of Information Act*, 63 GEO. L.J. 49 (1974); Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970); Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895 (1974); Note, *Developments Under the Freedom of Information Act—1974*, 1975 DUKE L.J. 416; Comment, *Developments Under the Freedom of Information Act—1973*, 1974 DUKE L.J. 251; Note, *Developments Under the Freedom of Information Act—1972*, 1973 DUKE L.J. 178; Project, 1972 DUKE L.J. 115, *supra* note 323, at 136-58; Project, 1971 DUKE L.J. 149, *supra* note 323, at 164-93; Note, *The Freedom of Information Act—The Parameters of the Exceptions*, 62 GEO. L.J. 177 (1973); Note, 38 GEO. WASH. L. REV. 150, *supra* note 323; Note, *Scope of Disclosure of Internal Revenue Communications and Information Files Under the Freedom of Information Act*, 8 U. MICH. J. L. REF. 329 (1975).

334. 5 U.S.C. § 552(a) (1970), as amended, 5 U.S.C.A. § 552(a) (Supp. Feb. 1975).

335. 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (1970).

336. Administrative Procedure Act § 2(a), 5 U.S.C. § 551(1) (1970). Congress, the federal courts, and the governments of United States territories and the District of Columbia are expressly excluded from the APA definition. 5 U.S.C. § 551(1)(A)-(D) (1970). See text at notes 356-64 *infra*.

337. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 4.

338. The amendments provide: "For the purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C.A. § 552(c) (Supp. Feb. 1975).

The conference report and the House report suggest that the St. Lawrence Seaway Development Corporation, the Federal Crop Insurance Corporation, the TVA and the Intra-American Foundation are government corporations. CONFERENCE REPORT, *supra* note 225, at 14; H.R. REP. NO. 93-876, *supra* note 329, at 8. The Senate originally proposed that the United States Postal Service be expressly included in the statutory definition. S. REP. NO. 93-854, *supra* note 329, at 33. The Conference report noted that the Postal Service, although not explicitly mentioned in the amendment, is within its scope. CONFERENCE REPORT, *supra*, at 14.

There is an interesting contradiction in the House and conference reports with respect to the Corporation for Public Broadcasting. The House report states that "[t]he term 'Government controlled corporation,' as used in this subsection, would include a

an agency as a government authority engaged in adjudication or rule-making,³³⁹ a significant concept for most of the APA, is rejected for the disclosure provisions of the FOIA.

The amended definition of agency has not yet been interpreted by the courts, so it is difficult to determine what its impact will be. Several FOIA cases, decided by the Court of Appeals for the District of Columbia before the 1974 Amendments became effective, dealt with the problem of applying the APA definition of agency. In *Soucie v. David*,³⁴⁰ the court found that the Office of Science and Technology (OST) was an agency because it was charged with the responsibility of independently evaluating various federal programs and did not merely advise and assist the President. The court stated that although "the statutory definition of 'agency' is not entirely clear, . . . the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific questions By virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act."³⁴¹

Several years later, in *Washington Research Project, Inc. v. HEW*,³⁴² the court distinguished *Soucie* on its facts and held that the initial project review groups (IRGs) for National Institute of Mental Health research grants were not agencies: "Unlike the OST, the IRGs do confine themselves to making recommendations The IRGs act as consultants with the [National Advisory Mental Health Council]; their members are strictly forbidden from communicating their groups' recommendations to applicants."³⁴³ The court said that in deciding whether a government unit is an agency, "[t]he important consideration is whether it has any authority in law to make decisions."³⁴⁴

In *Grumman Aircraft Engineering Corp. v. Renegotiation Board*,³⁴⁵ decided by the District of Columbia court of appeals after *Soucie* but before *Washington Research*, the application of the APA

corporation which is *not* owned by the Federal Government, such as the National Railroad Passenger Corporation (Amtrak) and the Corporation for Public Broadcasting (CPB)." H.R. REP. NO. 93-876, *supra*, at 8-9 (emphasis original). The conference report, on the other hand, states that the conferees "do not intend to include corporations which receive appropriated funds but are neither chartered by the Federal Government nor controlled by it, such as the Corporation for Public Broadcasting." CONFERENCE REPORT, *supra*, at 14-15.

339. 1 K. DAVIS, *supra* note 265, § 1.01 (1958).

340. 448 F.2d 1067 (D.C. Cir. 1971).

341. 448 F.2d at 1075.

342. 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 43 U.S.L.W. 3601 (U.S. May 12, 1975).

343. 504 F.2d at 247.

344. 504 F.2d at 248.

345. 482 F.2d 710 (D.C. Cir. 1974), *revd. on other grounds*, 43 U.S.L.W. 4502 (U.S. April 28, 1975).

definition of agency was considered at some length. The court held that a regional renegotiation board, considered wholly apart from the National Renegotiation Board, is an agency.³⁴⁶ Although some of the regional board's decisions were subject to de novo review by the National Board, the court held that the regional boards "serve as a discrete, decision-producing layer in the renegotiation process."³⁴⁷ On appeal, the Supreme Court found it unnecessary to decide this question, but did comment on the issue in a footnote.³⁴⁸ The Court agreed with the circuit court's conclusion that the regional board should have agency status because it has the power to issue "orders." The Court recognized, however, that the regional board has this final decision-making authority in only one class of cases that it handles; it noted that the circuit court never considered the possibility that the regional board might thus be an agency only for the purpose of these cases. This comment implies that agency status in the future may be based not on whether the unit "has *any* authority in law to make decisions,"³⁴⁹ but rather on whether it has the authority to make the particular type of decision with which a case is concerned. Any interpretation of the definition of agency that narrows its scope would be unfortunate, however, as it would limit the number of situations in which the FOIA would apply; the 1974 amendment to the definition³⁵⁰ indicates that Congress intended that the Act be broadly applied.

Whether the President is an agency for the purposes of the FOIA is still unclear. In *Soucie*, the court found it unnecessary to determine whether the original FOIA, which applied to every "organizational unit in the executive branch,"³⁵¹ applied to the President.³⁵² However, by suggesting that a presidential advisory group would not be an agency,³⁵³ the court implied that the Chief Executive himself is not subject to the disclosure provisions of the Act. Although, as a result of the 1974 amendments, the FOIA now expressly provides that any "establishment in the executive branch of the Government (including the Executive Office of the President)" is an agency,³⁵⁴ the

346. 482 F.2d at 710.

347. 482 F.2d at 715. The regional boards have their own investigating and negotiating personnel with whom private contractors must deal. The boards make formal recommendations to the National Board in some cases, and issue final decisions in others. 482 F.2d at 713-15.

348. *Renegotiation Bd. v. Grumman Aircraft Engr. Corp.*, 43 U.S.L.W. 4502, 4508 n.25 (U.S. April 28, 1975).

349. *Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 248 (D.C. Cir. 1974), *cert. denied*, 43 U.S.L.W. 3601 (U.S. May 12, 1975) (emphasis added).

350. 5 U.S.C.A. § 552(e) (Supp. Feb. 1975). See text at notes 338-39 *supra*.

351. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 4.

352. 448 F.2d 1067, 1073 (D.C. Cir. 1971).

353. 448 F.2d at 1075.

354. 5 U.S.C.A. § 552(e) (Supp. Feb. 1975).

conference report implies, in a manner similar to that of the *Soucie* court, that the FOIA does not apply to the President: "The term [Executive Office of the President] is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President."³⁵⁵

The APA definition of agency, incorporated in the FOIA, expressly excludes Congress, the federal courts, and the governments of the territories and the District of Columbia.³⁵⁶ These exceptions, retained by the 1974 amendment,³⁵⁷ have given rise to some interpretative difficulties. For example, in *Cook v. Willingham*³⁵⁸ the Tenth Circuit relied on the federal court exclusion in refusing to compel a prison warden to give a prisoner a copy of his presentence report. The report had been compiled for use by the sentencing court and was alleged to be under its exclusive control. The circuit court reasoned that since the sentencing court (a federal district court) was not an agency, the report was not an agency report and thus did not have to be disclosed.³⁵⁹

If the prison is an agency, however, the *Cook* case is difficult to reconcile with the language of the FOIA. The statute does not use the term "agency report"; in 1968, when the *Cook* case was decided, it merely required an agency to turn over "identifiable records" on request.³⁶⁰ Ordinarily, an agency should not be excused from disclosure merely because the records it possesses were not prepared by its staff. Perhaps the *Cook* case can be explained on the basis of the pre-sentence report's primary purpose; the report was prepared for and used by the sentencing court, and the prison was only an incidental possessor. However, this case is not significantly different from a case where an agency prepares and retains a report at the request of a nonagency. In the latter situation, the courts uniformly hold that the report must be disclosed.³⁶¹

Although no court has yet considered the matter, the GAO, the "watch dog" agency that ensures that congressionally appropriated funds are properly spent, has promulgated regulations relying on the fact that the FOIA definition of agency excludes Congress. Although the GAO professes to have a policy on disclosure that reflects the FOIA, its regulations state that the FOIA does not directly apply,

355. CONFERENCE REPORT, *supra* note 225, at 15.

356. 5 U.S.C. § 551(1)(A)-(D) (1970).

357. CONFERENCE REPORT, *supra* note 225, at 14.

358. 400 F.2d 885 (10th Cir. 1967).

359. 400 F.2d at 886.

360. 5 U.S.C. § 552(a)(3), *as amended*, 5 U.S.C.A. § 552(a)(3) (Supp. Feb. 1975).

361. *E.g.*, *Soucie v. David*, 448 F.2d 1067, 1076 (D.D.C. 1971) (report of the Office of Science and Technology prepared at the request of the President held to be an agency record).

and that its policy does not confer "on any member of the public a right under the Act of access to or information from the [GAO] records."³⁶² This interpretation of the applicability of the FOIA is hard to justify, however, since all other congressionally created agencies are considered to be within the scope of the Act.³⁶³ Furthermore, the GAO regulation conflicts with the basic policy of the Act—that the people have a right to know in detail the activities of government.³⁶⁴

2. The Disclosure Requirements

a. *Publication in the Federal Register.* Section 552(a)(1) of the FOIA requires each agency to publish certain information in the *Federal Register* "for the guidance of the public."³⁶⁵ The *Federal Register* is a magazine published daily, Monday through Friday, by the Office of the Federal Register under the authority of the Federal Register Act³⁶⁶ and the regulations of the Administrative Committee of the Federal Register.³⁶⁷ Compilations of the information required to be published in the *Federal Register* can normally be found in the *Code of Federal Regulations*, a special edition of the *Federal Register*,³⁶⁸ but, for the purposes of the FOIA, publication in the *Code* is not a substitute for publication in the *Federal Register*.³⁶⁹ There has been little controversy over the publication requirements of the FOIA; when they were enacted complaints were "more on the side of too much publication rather than too little."³⁷⁰

Four categories of information are required to be published in

362. 4 C.F.R. § 81.1 (1974). Information on small grain program abuses was denied by the GAO to one newspaper on the ground that, as an agency of Congress, the FOIA did not apply. FREEDOM OF INFORMATION CENTER, REPORT NO. 303, THE FOI ACT AND THE MEDIA 4 (1973).

363. See Note, 56 GEO. L.J. 18, *supra* note 323.

364. See text at notes 308-12 *supra*.

365. 5 U.S.C. § 552(a)(1) (1970).

366. 44 U.S.C. §§ 1501-11 (1970).

367. 1 C.F.R. §§ 1.1-22.7 (1974).

368. 1 C.F.R. §§ 8.1-9 (1974).

369. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 7. However, section 552(a)(1) does provide for incorporation by reference in the *Federal Register* when the information in question is "reasonably available to the class of persons affected thereby" and the Director of the Federal Register approves of such incorporation. 5 U.S.C. § 552(a)(1) (1970). Incorporation of mere summaries of agency material is not sufficient. ATTORNEY GENERAL'S MEMORANDUM, *supra*, at 12-13.

370. S. REP. NO. 89-813, *supra* note 310, at 6.

One of the few cases in which an agency's failure to publish information has been challenged is still pending. In *National Wildlife Fedn. v. Brinegar*, Civil No. 1269-73 (D.D.C., filed June 25, 1973), plaintiff demanded that, pursuant to section 552(a)(1)(B) of the FOIA, the Federal Highway Administration publish its statements of policies and procedures in the *Federal Register*. These documents were already available to the public, and the agency argued that it was making a good faith effort to organize them for publication. Interview with Richard Wolf, Institute for Public Interest Representation, in Washington, D.C., July 31, 1974.

the *Federal Register*. First, agencies are required by section 552(a)(1)(A) to publish descriptions of their "central and field organization" and the methods by which the public can obtain agency information and decisions. This organizational material will also appear in a special edition of the *Federal Register* called the *United States Government Organization Manual*.³⁷¹ The requirement that agencies publish the "places at which, the employees . . . from whom, and the methods whereby, the public can obtain information"³⁷² implies that they have the power to create appropriate procedures for disclosure.

Second, section 552(a)(1)(B) requires the publication of "statements of the general course and method by which [agency] functions are channeled and determined, including the nature and requirements of all formal and informal procedures available." This provision requires agencies to explain their functions and responsibilities, putting particular emphasis on their adjudicatory and rule-making functions. The Attorney General has maintained that "the criterion for publication [under section 552(a)(1)(B)] is whether the particular 'course and method' is of concern to the public. For example, procurement and other public contract functions and, in some cases, surplus property disposal functions, are matters in which members of the public have an interest, whereas information concerning other proprietary functions usually would not be useful to the public."³⁷³ It is hoped that this interpretation of section 552(a)(1)(B) will not be followed, however. Allowing agencies to determine for themselves that there is a lack of public interest in a matter could lead to abuse. Moreover, section 3 of the old APA granted broad discretion to the agencies to determine the public interest;³⁷⁴ the FOIA was intended to correct this "defect."³⁷⁵ Clearly some agency proprietary functions will be so limited in scope that they will not require specific comment, but the presumption should be in favor of publication.

Third, section 552(a)(1)(C) requires publication of "rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations."³⁷⁶ Rules of procedure, as defined in administrative law, spell out the requirements of an agency's practice for rule-making and adjudicative hearings.³⁷⁷ If an agency does not have any formalized rules of procedure, it must

371. *E.g.*, 1 C.F.R. §§ 9.1-2 (1973).

372. 5 U.S.C. § 552(a)(1)(A) (1970).

373. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 8.

374. *See* text at note 316 *supra*.

375. *See* text at notes 320-21 *supra*.

376. This provision attempts to eliminate unnecessary publication by requiring that "descriptions of forms" be published, rather than the forms themselves. S. REP. NO. 89-813, *supra* note 310, at 10.

377. *See* 1 K. DAVIS, *supra* note 265, § 6.01 (1958).

create and publish them. If an agency has not published its rules, the enforcement of an agency regulation may be enjoined.³⁷⁸

Finally, section 552(a)(1)(D) requires publication of "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." The first clause of this subsection requires the publication of rules adopted by an agency pursuant to law-making power delegated to it by the legislature; substantive rules are, in effect, administrative statutes. For example, eligibility requirements promulgated by the Bureau of Indian Affairs for general assistance benefits have been held to be within this clause.³⁷⁹ Although rules regulating rates will often not be of "general applicability,"³⁸⁰ they should be published if the rates are of interest to a broad spectrum of the public.³⁸¹

The second clause of this subsection requires the publication of interpretative rules, rules issued by an agency to guide its staff and regulated parties in interpreting the agency's statutory mandate. For example, Selective Service directives that tell Service officers what policies to consider in issuing civilian work orders for conscientious objectors have been held to be within the scope of this clause.³⁸² It has been argued that the rules, policies, and interpretations expressed in agency adjudicatory proceedings, as opposed to agency rule-making proceedings,³⁸³ are not "general" or "of general applicability" because they are directed only to the parties in the proceedings.³⁸⁴ However, to the extent that these rules, policies, and interpretations constitute agency "case law" that will influence other members of the public, there is no reason why the adjudicatory context should exempt them from the publication requirement.³⁸⁵

Section 552(a)(1) contains a sanction for the violation of any of its four subsections. It provides that "[e]xcept to the extent that a

378. See, e.g., *W.G. Cooley Transfer & Storage Corp. v. Froehlke*, 480 F.2d 498 (4th Cir. 1973). But see ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 10.

379. *Morton v. Ruiz*, 415 U.S. 199 (1974).

380. See S. REP. NO. 88-1219, 88th Cong., 2d Sess. 4 (1964).

381. Cf. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 11.

382. *Piercy v. Tarr*, 343 F. Supp. 1120 (N.D. Cal. 1972); *Gardiner v. Tarr*, 341 F. Supp. 422 (D.D.C. 1972).

383. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969).

384. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 10. This position has been adopted by some agencies. E.g., 14 C.F.R. § 1206.200(b)(ii) (1973) (NASA); 31 C.F.R. § 1.3(c) (1973) (Office of the Secretary of the Treasury).

385. Publication of all agency decisions, however, may not be feasible. K. DAVIS, *supra* note 265, § 3A.7, at 125-26 (Supp. 1970). Considerable difficulties may be encountered in separating adjudications of general interest from adjudications of unique questions. A "sensible compromise" suggested by one commentator is the publication of summaries of important decisions similar to the abstracts and headnotes preceding reports of judicial decisions. Note, 74 COLUM. L. REV. 895, *supra* note 333, at 900-01 (1974).

person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." This sanction prevents an agency from imposing obligations on private individuals pursuant to unpublished rules or regulations that were required to be published under one of the above subsections.³⁸⁶ It also prevents an agency from depriving a person of benefits granted by an improperly unpublished rule.³⁸⁷ However, if a private party adversely affected by unpublished material has had "actual and timely notice" of the contents of the material, he or she cannot seek protection under the sanction.³⁸⁸ This exception is justified by the basic purpose of the Act; the FOIA was intended to provide access to information for *uninformed* persons affected by agency activities.³⁸⁹

It is possible for a court to mitigate the strength of this sanction by refusing to acknowledge that an individual has been "adversely affected" by the unpublished material, or by affording the unpublished material interpretative weight in its decision. For example, in *Hogg v. United States*,³⁹⁰ the Sixth Circuit held that a taxpayer was not adversely affected by an unpublished order issued by the United States Attorney General. The order provided that a United States Attorney must file a notice of appeal in a federal case at the end of the applicable period for filing appeals, even if the Department of Justice has not notified the Attorney that an appeal should be taken. The taxpayer in *Hogg* had been successful in the lower court; subsequently, the United States Attorney filed an appeal pursuant to this order. The circuit court stated that "[a]ny delay incident to the ultimate payment of the judgment in favor of the taxpayer which might result from the dismissal of an appeal or from an affirmance would be compensated for by the payment of interest at the rate of six percent per annum,"³⁹¹ and it refused to recognize potential reversal as an adverse effect of the order. However, if notice of appeal had not been filed pursuant to the order, the taxpayer would have been assured of victory. In *Thomas v. County Office Committee*,³⁹² a federal district court used definitional material found in an unpublished handbook to interpret "demand" in the Agricultural Act of 1970.

386. *E.g.*, *Dairylea Cooperative, Inc. v. Butz*, 504 F.2d 80, 84 n.8 (2d Cir. 1974); *Percy v. Brennan*, 384 F. Supp. 800, 813 (S.D.N.Y. 1974).

387. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 12.

388. *Rodriguez v. Swank*, 318 F. Supp. 289, 295 (N.D. Ill. 1970).

389. *See* text at notes 309-10, 320-21 *supra*.

390. 428 F.2d 274 (6th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

391. 428 F.2d at 280.

392. 324 F. Supp. 1271 (S.D. Tex.), *reaffd. in supplemental opinion*, 327 F. Supp. 1244 (S.D. Tex. 1971).

Both of these cases illustrate the methods by which a court can reduce the effectiveness of the "adversely affected" sanction, thereby reducing an agency's incentive to publish specific types of information. Perhaps these courts narrowly read the section 552(a)(1) sanction because of the breadth of sections 552(a)(2) and (a)(3); most agency information not covered by the publication requirements of (a)(1) will have to be made available for public inspection under (a)(2) and (a)(3).³⁹³

b. *Public inspection.* Section 552(a)(2) of the FOIA requires that three categories of information be made available for public inspection and copying, unless the materials are published and offered for sale. The first category, "(a)(2)(A) information," is composed of "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." Agencies often make use of trial-type proceedings for deciding disputed questions of fact, determining policy in a precise factual setting, and ordering compliance with specific laws and regulations.³⁹⁴ All final agency opinions and all agency orders that result from the adjudicative process must be made available for public inspection.

In some cases, the question whether an opinion must be made available under (a)(2)(A) will depend on whether the particular unit issuing the opinion is an agency for the purposes of the FOIA.³⁹⁵ The test for agency status has been whether the particular unit has the authority to make decisions, rather than just recommendations.³⁹⁶ Even if an opinion was issued by an agency, however, it must constitute a "final" agency decision in order to come within (a)(2)(A). In *NLRB v. Sears, Roebuck & Company*,³⁹⁷ the Supreme Court suggested that in deciding whether requested documents are final opinions, "an understanding of the function of the documents . . . in the context of the administrative process which generated them" is "[c]rucial to the decision" of the case.³⁹⁸ To be disclosable under (a)(2)(A), each document must represent the "final disposition" of a matter, rather than the predecisional communication that merely recommends some course of agency action.³⁹⁹

393. See text at notes 394-495 *infra*.

394. See generally 1 K. DAVIS, *supra* note 265, § 8 (1958).

395. See text at notes 334-64 *supra*. E.g., *Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 245 (D.C. Cir. 1974), *cert. denied*, 43 U.S.L.W. 3601 (U.S. May 12, 1975).

396. See *Washington Research Project, Inc. v. HEW*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 43 U.S.L.W. 3601 (U.S. May 12, 1975); *Grumman Aircraft Engr. Corp. v. Renegotiation Bd.*, 482 F.2d 710 (D.C. Cir. 1973), *revd. on other grounds*, 43 U.S.L.W. 4502 (U.S. April 28, 1975); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971); text at notes 334-64 *supra*.

397. 43 U.S.L.W. 4491 (U.S. April 28, 1975).

398. 43 U.S.L.W. at 4493. See *Renegotiation Bd. v. Grumman Aircraft Engr. Corp.*, 43 U.S.L.W. 4502, 4503 (U.S. April 28, 1975).

399. 43 U.S.L.W. at 4496-500. The question whether an agency opinion is "final"

If an agency record is an "order" rather than an "opinion," there is no need to determine whether it is final because (a)(2)(A) requires disclosure of all "orders, made in the adjudication of cases."⁴⁰⁰ It is often difficult to distinguish between an order and an opinion, however.⁴⁰¹ One interpretive source of the FOIA, the *Attorney General's Memorandum*,⁴⁰² states that "a statement of principles and reasoning may be set forth in an 'opinion' issued with an order, and the 'order' itself is merely a summary statement of the agency's final action in the adjudication of a case."⁴⁰³ The Circuit Court for the District of Columbia, however, in *American Mail Line, Ltd. v. Gulick*,⁴⁰⁴ indicated that an adjudicatory disposition cast in the form of an order may require the publication of material on which the order is expressly based.⁴⁰⁵ The memorandum that the court ordered disclosed as part of the "order" in *Gulick*, could arguably be considered an opinion under the Attorney General's definition. The distinction between an order and an opinion becomes crucial if the statement at issue is not "final." If the statement is an opinion, it need not be disclosed; if the statement is part of an order, it must be disclosed.

The second category of information that must be made available under (a)(2), "(a)(2)(B) information," includes "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." This category includes policy statements that are not "general" and interpretations that are not "of general applicability," which, therefore, are not covered by the section 552(a)(1) publication requirements.⁴⁰⁶

The Internal Revenue Service sought to protect its private letter rulings⁴⁰⁷ and technical advice memoranda⁴⁰⁸ from the provisions of (a)(2)(B) by arguing that these materials are not "adopted by the agency" because they are not relied on as precedent by the Service.⁴⁰⁹

becomes crucial in cases where the agency claims that the opinion is exempt from disclosure under the inter- and intra-agency memoranda exemption of the Act: the Court in *Sears* held that this latter exemption can never apply to "final" agency opinions. 43 U.S.L.W. at 4498. See text at notes 673-85 *infra*.

400. *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 702 (D.C. Cir. 1969).

401. An order is often incorporated in an opinion. See 2 K. DAVIS, *supra* note 265, § 16.13, at 485 (1958) ("A typical opinion of a regulatory agency contains a syllabus, findings of fact, discussion of questions of law and policy resembling a reasoned opinion of an appellate court, and the order entered").

402. For a discussion of the interpretive value of the *Memorandum* see note 323 *supra*.

403. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 18.

404. 411 F.2d 696 (D.C. Cir. 1969).

405. 411 F.2d at 702.

406. See text at notes 379-85 *supra*.

407. 26 C.F.R. § 601.201(a)(2) (1974).

408. 26 C.F.R. § 601.105(b)(5) (1974).

409. *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1303 (D.D.C. 1973), *modified in part*, 505 F.2d 350 (D.C. Cir. 1974).

The Service found support for its position in the House report on the FOIA.⁴¹⁰ Both the letter rulings and the memoranda interpret the tax laws in the context of specific facts; the former are sent to taxpayers and the latter to Internal Revenue Service district directors.⁴¹¹ In *Tax Analysts & Advocates v. Internal Revenue Service*,⁴¹² the federal district court held that (a)(2)(B) was applicable to both communications; the express language of the provision was to be given primacy over the contradictory statements of the House report.⁴¹³

The district court in *Tax Analysts* did accept the precedential-nonprecedential distinction advanced by the Service, however. The court found that although letter rulings were never cited in later interpretations, many still qualified as precedents because they were filed for use as reference material.⁴¹⁴ While the court wisely discarded citation by the Service as the standard for determining precedent,⁴¹⁵ its approach ultimately makes the application of (a)(2)(B) depend on whether the Service files material in the "routine alphabetical file," to be disposed of after four years, or in the "reference file," to be preserved for possible later use.⁴¹⁶ The *Tax Analysts* approach may thus serve to induce agencies to create nonreference files in order to avoid disclosure.⁴¹⁷

The third category of material to be made available under (a)(2) is described in subsection (a)(2)(C) as "administrative staff manuals and instructions to staff that affect a member of the public." The distinction made in (a)(2)(C) between "administrative" and "nonadminis-

410. "[A]n agency may not be required to make available for public inspection and copying any advisory interpretation on a specific set of facts which is requested by and addressed to a particular person, provided that such interpretation is not cited or relied upon by any officer or employee of the agency as a precedent in the disposition of other cases." H.R. REP. NO. 89-1497, *supra* note 310, at 7. This position was also adopted by the ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 16.

411. 26 C.F.R. § 601.201(a)(2) (1974) (private letter rulings); 26 C.F.R. § 601.105(b)(5) (1974) (technical advice memos).

412. 362 F. Supp. 1298 (D.D.C. 1973), *modified in part*, 505 F.2d 350 (D.C. Cir. 1974).

413. 362 F. Supp. 1304-05. On appeal, the circuit court held that the technical advice memoranda were exempt from disclosure under 5 U.S.C. § 552(b)(3) (1970). *Tax Analysts & Advocates v. IRS*, 505 F.2d 350, 355 (D.C. Cir. 1974). *See Note*, 8 U. MICH. J. L. REF. 329, *supra* note 333, at 334-36.

414. 362 F. Supp. at 1305-06. *Cf.* National Prison Project of the ACLU Foundation, Inc. v. Sigler, 390 F. Supp. 789 (D.D.C. 1975).

415. 362 F. Supp. at 1306.

416. 362 F. Supp. at 1305.

417. The distinction between precedential and nonprecedential materials may be useful, however, in distinguishing between interpretations "of general applicability" that must be published under section 552(a)(1)(D) and those interpretations that must be made available under (a)(2)(B). *See* K. DAVIS, *supra* note 265, § 3A.9, at 130 (Supp. 1970). Davis suggests that (a)(2)(B) be amended to make it clear that agency statements and interpretations need not be precedents and need not be the end product of administration. K. DAVIS, *supra*, § 3A.33, at 178 (Supp. 1970).

trative" staff manuals is explained in the Senate report on the FOIA: "The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters rather than to law enforcement matters protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action."⁴¹⁸ While the dichotomy between "administrative matters" and "law enforcement matters" has been criticized,⁴¹⁹ it generally has been accepted by the courts.⁴²⁰ Two circuits, however, have narrowed the scope of law enforcement matters to include only information that, if known to the public, would significantly impede the enforcement process.⁴²¹ Such an impediment exists "*only* when information is made available which allows persons simultaneously to violate the law and avoid detection."⁴²² Thus, portions of a Bureau of Customs manual instructing agents on the planning and operation of a "stakeout" are excluded from (a)(2)(C) because their effectiveness would be materially impeded by disclosure.⁴²³

If disclosure of manual information encourages compliance with the law, rather than noncompliance, (a)(2)(C) requires disclosure. Generally, disclosure of agency inspection procedures and enforcement standards will encourage compliance with the law, and therefore this information must be made available to the public. For example, portions of the Internal Revenue Service Manual dealing with

418. S. REP. NO. 89-813, *supra* note 310, at 2. See *Hawkes v. IRS*, 467 F.2d 787, 795 (6th Cir. 1972), *affd. after remand*, 507 F.2d 481 (6th Cir. 1974):

Law enforcement is the process by which a society secures compliance with its duly adopted rules. Enforcement is adversely affected *only* when information is made available which allows persons simultaneously to violate the law and to avoid detection. Information which merely enables an individual to conform his actions to an agency's understanding of the law applied by that agency does not impede law enforcement and is not excluded from compulsory disclosure under (a)(2)(C).

Far from impeding the goals of law enforcement, in fact, the disclosure of information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law . . . Materials providing such information are administrative in character and clearly discloseable under (a)(2)(C).
(Emphasis original).

419. K. DAVIS, *supra* note 265, § 3A.12, at 136-37 (Supp. 1970); Comment, 1974 DUKE L.J. 251, *supra* note 333, at 280-84.

420. *Stokes v. Brennan*, 476 F.2d 699, 701 (5th Cir. 1973); *Hawkes v. IRS*, 467 F.2d 787, 795 (6th Cir. 1972), *affd. after remand*, 507 F.2d 481 (6th Cir. 1974); *United States v. Imbrunone*, 379 F. Supp. 256, 260 (E.D. Mich. 1974).

421. *Stokes v. Brennan*, 476 F.2d 699, 701 (5th Cir. 1973); *Hawkes v. IRS*, 467 F.2d 787, 795 (6th Cir. 1972), *affd. after remand*, 507 F.2d 481 (6th Cir. 1974).

422. *Hawkes v. IRS*, 467 F.2d 787, 795 (6th Cir. 1972), *affd. after remand*, 507 F.2d 481 (6th Cir. 1974) (emphasis original). See Note, 8 U. MICH. J. L. REF. 329, *supra* note 333, at 336-37.

423. *Concord v. Ambrose*, 333 F. Supp. 958 (N.D. Cal. 1971).

424. *Hawkes v. IRS*, 467 F.2d 787, 795 (6th Cir. 1972), *affd. on remand*, 507 F.2d 481 (6th Cir. 1974).

the examination of returns and the interrogation of taxpayers⁴²⁴ and training manuals for Occupational Safety and Health Administration officers⁴²⁵ have been held to fall within (a)(2)(C). Thus, the statement in the House report that "guidelines for the staff in auditing or inspection procedures" are not covered by (a)(2)(C)⁴²⁶ appears not to be authoritative.

Subsection (a)(2)(C) also covers "instructions to staff." This apparently refers to the same type of information as is compiled in staff manuals, and the law enforcement exemption similarly should apply. For (a)(2)(C) to apply, the "instructions" must be mandatory, and not merely suggestions.⁴²⁷

All materials within the three (a)(2) categories must be made publicly available. Procedures that detail the avenues of public access to (a)(2) information must be established, and agencies may be ordered to modify their procedures if they entail excessive delay or complexity.⁴²⁸ Information from the larger agencies can best be made available through public reading rooms.⁴²⁹ If (a)(2) materials are promptly published *and* copies are offered for sale, they will be considered publicly available, but the supplemental maintenance of a public reading room has been recommended.⁴³⁰

Subsection (a)(2) also requires that the public be permitted to copy available materials.⁴³¹ This subsection does not expressly provide for charging the public a fee for copying, or for the service of providing (a)(2) documents in specie, but the practice would seem to be allowed, subject to the constraints of section 552(a)(4) of the FOIA.⁴³²

All subsection (a)(2) information issued after July 4, 1967, must be indexed, and the indexes, for the most part, must be published: "Each agency also shall maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph [(a)(2)] to be made available or published."⁴³³ This subsection, in conformity

425. *Stokes v. Brennan*, 476 F.2d 699, 701 (5th Cir. 1973).

426. H.R. REP. NO. 89-1497, *supra* note 310, at 7.

427. *Sears, Roebuck & Co. v. NLRB*, 346 F. Supp. 751, 753 (D.D.C.), *rev'd. on other grounds*, 473 F.2d 91 (D.C. Cir. 1972), *cert. denied*, 415 U.S. 950 (1974).

428. *Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 253 (D.C. Cir. 1974), *cert. denied*, 43 U.S.L.W. 3601 (U.S. May 12, 1975).

429. *E.g.*, 4 C.F.R. § 81.5 (1974) (General Accounting Office); 10 C.F.R. § 9.7 (1974) (Atomic Energy Commission); 14 C.F.R. § 310.4 (1973) (Civil Aeronautics Board).

430. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 18.

431. S. REP. NO. 89-813, *supra* note 310, at 76 ("the right to copy these matters is supplemental to the right to inspect and makes the later right more meaningful").

432. *See* text at notes 847-99 *infra*.

433. 5 U.S.C.A. § 552(a)(2) (Supp. Feb. 1975).

with typical agency practice, permits agencies to maintain a number of different indexes covering different types of material.⁴³⁴

"[T]o provide greater accessibility to each agency's index,"⁴³⁵ and to "encourage agencies to maintain their indexes in a current manner,"⁴³⁶ the 1974 FOIA Amendments added a requirement that indexes be published at least quarterly.⁴³⁷ Publication by commercial firms is considered sufficient.⁴³⁸ The quarterly publication requirement can also be met by the publication of supplements, rather than completely new indexes.⁴³⁹ Furthermore, the Senate report suggests that for agencies such as the Railroad Retirement Board and the Small Business Administration, lack of sufficient public interest would permit publication by "photocopy reproduction" rather than by printing and mass distribution.⁴⁴⁰ If quarterly publication is considered by an agency to be unnecessary and impractical, the agency must publish an order in the *Federal Register* increasing the publication interval or serving notice of its intention not to publish at all.⁴⁴¹ The sale of published indexes is permitted but not required, and copies of unpublished indexes must be provided at a price not to exceed "the direct cost of duplication."⁴⁴² The published index requirement is intended to permit greater public access to government information through the use of indexes located in institutions and libraries.⁴⁴³

Only (a)(2) materials issued after the effective date of the FOIA must be indexed. However, in *Irons v. Gottschalk*⁴⁴⁴ the plaintiff persuaded the court to order disclosure under section 552(a)(3) of currently existing indexes of the Patent Office for 175 volumes of manuscript decisions from 1853 to 1954. The court ordered the agency to bind the indexes into the front of each volume despite the fact that it was estimated that it would take \$300 and two man-days to reproduce the 3,744 pages in question.⁴⁴⁵ Thus, the prospective nature of the (a)(2) index requirement should not cause an information seeker to neglect the possibility of requesting the disclosure of indexes to materials issued before 1967.

434. See *Irons v. Gottschalk*, 369 F. Supp. 403, 409 (D.D.C. 1974) (Patent Office sufficiently complied with the indexing requirement by compiling five separate indexes).

435. S. REP. NO. 93-854, *supra* note 329, at 8.

436. *Id.*

437. 5 U.S.C.A. § 552(a)(2) (Supp. Feb. 1975).

438. CONFERENCE REPORT, *supra* note 225, at 7; H.R. REP. NO. 93-876, *supra* note 329, at 5; S. REP. NO. 93-854, *supra* note 329, at 9.

439. S. REP. NO. 93-854, *supra* note 329, at 8-9.

440. *Id.* at 8.

441. 5 U.S.C.A. § 552(a)(2) (Supp. Feb. 1975).

442. 5 U.S.C.A. § 552(a)(2) (Supp. Feb. 1975).

443. S. REP. NO. 93-854, *supra* note 329, at 8.

444. 369 F. Supp. 403 (D.D.C. 1974).

445. 369 F. Supp. at 405.

One problem with the index requirement is that statements of policy and interpretation that have been published in the *Federal Register* are not covered by (a)(2) and therefore need not be indexed. Unless agencies voluntarily integrate this published material into their indexes of unpublished information, the agency indexes of statements of policy and interpretation will be incomplete.

The burden placed on agencies by the index requirement is significant. For example, several agencies issue millions of orders yearly, which frequently state only whether a request has been granted or denied.⁴⁴⁶ All of these orders must be indexed. If (a)(2) material is not indexed it may only be used by an agency as precedent if the party affected "has actual and timely notice of the terms thereof."⁴⁴⁷ The *Attorney General's Memorandum* advises agencies to use actual notice whenever practical to protect against possible defects in publication and indexing.⁴⁴⁸

There is one general exception to the availability requirements of section 552(a)(2): "To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction."⁴⁴⁹ This provision generally allows agencies to delete names and addresses from (a)(2) materials.⁴⁵⁰ If a name, even though deleted, can be associated with a document through other identifying details, those details must also be deleted to protect individual privacy.⁴⁵¹ The agency may delete only the minimum amount of information necessary to protect privacy, however.⁴⁵²

The failure to include "orders" in the privacy exception to section 552(a)(2) implies that an agency cannot prevent the disclosure of identifying details in ultimate agency directives. The definition of an order becomes crucial, therefore, in determining the scope of this exception. If an order is only "a summary of the agency's final action,"⁴⁵³ it ordinarily will contain no details beyond the private

446. K. DAVIS, *supra* note 265, § 3A.14, at 140 (Supp. 1970).

447. 5 U.S.C. § 552(a)(2)(ii) (1970). This sanction is similar to that provided in section 552(a)(1). See text at notes 386-89 *supra*.

448. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 22.

449. 5 U.S.C. § 555(a)(2) (1970).

450. *Rural Housing Alliance v. United States Dept. of Agriculture*, 498 F.2d 73, 78 (D.C. Cir. 1974); *Washington Research Project, Inc. v. HEW*, 366 F. Supp. 929, 937 (D.D.C. 1973), *affd. in part and revd. in part on other grounds*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 43 U.S.L.W. 3601 (U.S. May 12, 1975).

451. *Washington Research Project, Inc. v. HEW*, 366 F. Supp. 929, 937 (D.D.C. 1973), *affd. in part and revd. in part on other grounds*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 43 U.S.L.W. 3601 (U.S. May 12, 1975).

452. *Washington Research Project, Inc. v. HEW*, 366 F. Supp. 929, 937 (D.D.C. 1973), *affd. in part and revd. in part on other grounds*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 43 U.S.L.W. 3601 (U.S. May 12, 1975). Cf. text at notes 501-05 *infra*.

453. See ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 18.

party's name and address, and the agency's final judgment. Under this definition, any discussion of the factual circumstances and reasoning behind an order will be an opinion and appropriate deletions from the opinion to protect individual privacy could be made. If, however, a private party's name is revealed in an order, there may be a substantial number of identifying details in the opinion accompanying the order that would have to be deleted. It would thus be better to allow the deletion of names and addresses from orders as well as from opinions, so that opinions could be disclosed in full. At least one case, *Grumman Aircraft Engineering Corp. v. Renegotiation Board*,⁴⁵⁴ has taken this position. Since ninety per cent of the renegotiation board's determinations were made by order without opinion, the court reasoned that the statutory purpose of concealing personal identity required the deletion of identifying details from the Board's orders.

If information is deleted from (a)(2) material, "in each case the justification for the deletion [must] be explained fully in writing."⁴⁵⁵ Most agency explanations, however, are merely perfunctory. For example, the Department of Health, Education, and Welfare uses the following preamble: "Names of parties and certain other identifying details have been removed [and fictitious names substituted] in order to prevent a clearly unwarranted invasion of the personal privacy of the individuals involved."⁴⁵⁶

c. *Disclosure of records upon request.* Section 552(a)(3) of the FOIA currently provides that "[e]xcept with respect to records made available under [sections 552(a)(1) and (a)(2),] each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."⁴⁵⁷ Because this section provides for disclosure to "any person," it has been held that the Act precludes consideration of the private interest or motivation of the party seeking relief.⁴⁵⁸ For the purposes of the Act, a "person" is

454. 425 F.2d 578, 580 n.8 (D.C. Cir. 1970).

455. 5 U.S.C. § 552(a)(2) (1970).

456. 45 C.F.R. § 5.16 (1973).

457. 5 U.S.C.A. § 552(a)(3) (Supp. Feb. 1975).

458. *Robles v. EPA*, 484 F.2d 843, 847 (4th Cir. 1973); *Hawkes v. IRS*, 467 F.2d 787, 790 n.3 (6th Cir. 1972); *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971); *Kreindler v. Department of the Navy*, 363 F. Supp. 611, 613 (S.D.N.Y. 1973). See H.R. REP. NO. 92-1419, *supra* note 327, at 76-77. Cf. *Getman v. NLRB*, 450 F.2d 670, 677 n.24 (D.C. Cir. 1971).

Prior to the enactment of the FOIA, records were available only "to persons properly and directly concerned." See text at notes 313-15 *supra*. The FOIA specifically abrogated any such limitation by providing that nonexempt records shall be available to "any person." See H.R. REP. NO. 89-1497, *supra* note 310, at 1, 8; S. REP. NO. 89-813, *supra* note 310, at 5.

defined as "an individual, partnership, corporation, association, or public or private organization other than an agency."⁴⁵⁹ One court has held that a foreign government or instrumentality is a "public or private organization" within this definition.⁴⁶⁰

Section (a)(3) provides that agency "records" shall be disclosed. Agency regulations commonly define the term "record" to include punch cards, magnetic tapes, microfilm, sound recordings, maps, photographs, slides, and motion pictures.⁴⁶¹ Tangible objects, equipment, and vehicles are not records. Thus, a physician and a pathology professor were unsuccessful in using (a)(3) to obtain a rifle, ammunition, clothing, bullets and metal fragments, all connected with the assassination of President Kennedy.⁴⁶²

In order to obtain information under (a)(3), the records sought must exist and be in the possession of an agency;⁴⁶³ a person cannot obtain future records.⁴⁶⁴ Agencies are not required to calculate rates, proportions or trends, or to make comparisons from items in their files,⁴⁶⁵ but they may be required to aggregate existing separate indexes.⁴⁶⁶ Agencies may not be compelled to write opinions in cases in which they would not otherwise be required to do so; the FOIA only mandates disclosure of documents that the law requires the agency to prepare or that the agency has decided for its own reasons to create.⁴⁶⁷ It has also been argued that the records requested must bear some relation to the function of the agency to which the request is made.⁴⁶⁸ Agencies tend to refer requests to the agency that has primary responsibility for the records requested.⁴⁶⁹

459. 5 U.S.C. § 551(2) (1970).

460. *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 776 (D.D.C. 1974).

461. *E.g.*, 45 C.F.R. § 5.5(a) (1974) (HEW); 14 C.F.R. § 1206.101 (1974) (NASA).

462. *Nichols v. United States*, 325 F. Supp. 130 (D. Kan. 1971), *affd. on other grounds*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972).

463. *Nichols v. United States*, 325 F. Supp. 130, 137 (D. Kan. 1971), *affd. on other grounds*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972). *See* 4 C.F.R. § 81.3(b) (1974) (GAO).

464. *Tuchinsky v. Selective Serv. Sys.*, 294 F. Supp. 803, 805 (N.D. Ill.), *affd.*, 418 F.2d 155 (7th Cir. 1969). However, once records are made, subsection (a)(3) requires the agency to make them "promptly available." At least one district court has held that this requirement mandates the release of records "at the earliest possible time they are completed . . ." *Packer v. Kleindienst*, Civil No. 1988-72, *mem. op.* at 4 (D.D.C., July 8, 1974).

465. *See* 14 C.F.R. § 1206.202 (1974) (NASA); 45 C.F.R. § 5.15 (HEW).

466. *E.g.*, 4 C.F.R. § 81.3(b) (1974) (GAO); 7 C.F.R. § 1.4(d) (1974) (Department of Agriculture).

467. *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4500 (U.S. April 28, 1975).

468. *Soucie v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971).

469. *E.g.*, 6 C.F.R. § 102.6 (1974) (requests for records in the possession of the Cost of Living Council should be submitted to the agency from which they originated); 7 C.F.R. § 1.5(c) (1974) (Department of Agriculture will refer requests to agency primarily responsible); 10 C.F.R. § 9.5(b) (1974) (AEC will refer requests to agency with primary and exclusive responsibility).

Agencies must engage in an adequate search for information that is requested.⁴⁷⁰ At least one court has refused to scrutinize the adequacy of a search where the request for information was nonspecific. In *Exxon Corp. v. FTC*⁴⁷¹ the plaintiff made a blanket request for all communications during a three and a half year period between the FTC and any member of Congress, or any other agency, on the subject of petroleum. The Secretary of the FTC filed an affidavit stating that a thorough search had been made, and that all requested records had been located and reported. The plaintiff questioned the adequacy of the search and requested affidavits of personal knowledge from each individual participating in the search. The court held that, under the circumstances, the affidavit of the Secretary was sufficient to prove that the FTC had recovered all identifiable records of the kind requested: "It would be unreasonable to allow Exxon the extended discovery it wants when it has caused the Commission to search every nook and cranny; its discovery is aimed not at ascertaining whether identified records have been produced, but whether there exist additional records which might be specifically identified by Exxon."⁴⁷²

The original version of section 552(a)(3) provided that "each agency, on request for identifiable records . . . shall make the records promptly available . . ." ⁴⁷³ The 1974 FOIA amendments eliminated the "identifiable records" clause and substituted a requirement that the request "reasonably describe" the materials sought.⁴⁷⁴ Although this amendment indicates congressional dissatisfaction with narrow judicial interpretations of identifiability,⁴⁷⁵ it was not intended to change the basic identifiability standard.⁴⁷⁶ That standard requires that requests contain reasonable descriptions that will enable government employees to locate the records sought.⁴⁷⁷ The courts generally have held that the difficulty the agency will have in locating the materials is not to be considered.⁴⁷⁸ A description that does not

470. *Exxon Corp. v. FTC*, 384 F. Supp. 755 (D.D.C. 1974).

471. 384 F. Supp. 755 (D.D.C. 1974).

472. 384 F. Supp. at 760.

473. 5 U.S.C. § 552(a)(3) (1970), *as amended*, 5 U.S.C.A. § 552(a)(3) (Supp. Feb. 1975) (emphasis added).

474. *See* text at note 457 *supra*.

475. *See* H.R. REP. NO. 92-1419, *supra* note 327, at 83.

476. S. REP. NO. 93-854, *supra* note 329, at 10. The test under the "identifiable records" language also required that the request give a reasonable description of the records. *See, e.g.,* *Sears v. Gottschalk*, 502 F.2d 122, 125 (4th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3683 (June 30, 1975); *National Cable Television Assn., Inc. v. FCC*, 479 F.2d 183, 190-91 (D.C. Cir. 1973); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970). *See* 5 C.F.R. § 294.107 (1974) (Civil Service Commission); 7 C.F.R. § 295.6(b) (1974) (Food and Nutrition Service); 7 C.F.R. § 900.510(a) (1974) (Agricultural Marketing Service).

477. *See* note 476 *supra*.

478. *Sears v. Gottschalk*, 502 F.2d 122, 126 (4th Cir. 1974), *cert. denied*, 43 U.S.L.W.

provide the agency with a starting point for locating the requested materials is inadequate, however. For example, in *Long v. IRS*,⁴⁷⁹ a request for all IRS files relating to plaintiff's business was held to be too vague; it did not provide the Service with enough details to enable its employees to begin their search.

At least one court has held that an excessively broad request does not meet the identifiability standard. In *Irons v. Schuyler*⁴⁸⁰ the plaintiff requested "all unpublished manuscript decisions of the Patent Office";⁴⁸¹ these records had been acquired over more than 100 years and apparently numbered in the thousands. The court held that the plaintiff's "sweeping, indiscriminate request" was too broad to be identifiable.⁴⁸²

Some agency regulations state flatly that blanket or generalized requests will not be honored.⁴⁸³ NASA will not honor requests phrased in terms of "the entire file" or "all matters relating to."⁴⁸⁴ Other regulations seek to deny generalized requests on the ground of administrative inconvenience. The United States Customs Service, for example, will recognize requests for all records of a category only if the collection of those records will not unduly burden or interfere with the agency's operations.⁴⁸⁵ Regulations such as these, however, are not justifiable in view of (a)(3)'s legislative history.⁴⁸⁶ A request for "all" records of a certain class should not be considered overbroad if the class itself is specifically defined.⁴⁸⁷ Thus, the Court of

3683 (June 30, 1975); *National Cable Television Assn., Inc. v. FCC*, 479 F.2d 183 (D.C. Cir. 1973); *Frankel v. SEC*, 336 F. Supp. 675 (S.D.N.Y. 1971), *revd. on other grounds*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972); *Wellford v. Hardin*, 315 F. Supp. 175 (D. Md. 1970), *affd. on other grounds*, 444 F.2d 21 (D.C. Cir. 1971).

479. 339 F. Supp. 1266 (W.D. Wash. 1971).

480. 465 F.2d 608 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972). The Senate report accompanying the 1974 bill asserts that the amendments do not affect the holding of this case. S. REP. NO. 93-854, *supra* note 329, at 10.

481. 465 F.2d at 610.

482. 465 F.2d at 612-13.

483. *E.g.*, 4 C.F.R. § 303.6(b) (1974) (Cost Accounting Standards Board).

484. 14 C.F.R. § 1206.602 (1974).

485. 19 C.F.R. § 103.2(d) (1974). If the categorical request does unduly burden the agency, agency personnel will confer with the requester in an attempt to reduce the request to manageable proportions. For similar agency regulations see 14 C.F.R. § 310.6(b) (1974) (CAB); 13 C.F.R. § 102.4(d)(2) (1974) (Small Business Administration).

486. See S. REP. NO. 89-813, *supra* note 310, at 8; H.R. REP. NO. 89-1497, *supra* note 310, at 9 ("The persons requesting records must provide a reasonable description enabling Government employees to locate the requested material, but the identification requirement must not be used as a method for withholding" (emphasis added)).

487. FED. R. CIV. P. 34(b) permits discovery requests by category if described "with reasonable particularity." Discovery standards may serve as guidelines in determining identifiability. S. REP. NO. 89-813, *supra* note 310, at 2; ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 24. See also *Frankel v. SEC*, 336 F. Supp. 675 (S.D.N.Y. 1971), *revd. on other grounds*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972) (broadness defense rejected).

Appeals for the Fourth Circuit, in *Sears v. Gottschalk*,⁴⁸⁸ disagreed with the district court's finding that, in a request for "all [existing] abandoned United States patent applications . . . '[a]ll' is not sufficiently descriptive."⁴⁸⁹ The circuit court held that, although the plaintiff's request was far-reaching, it was sufficiently specific to enable the agency to locate the requested records.⁴⁹⁰ The "categorical nature of the request" did not make the records unidentifiable.⁴⁹¹

An agency cannot allege that records are unidentifiable if it in fact knows what records are sought. If an agency statement specifically refers to a certain class of materials, a request that refers to the class will sufficiently identify the materials.⁴⁹² In *Bristol-Myers Co. v. FTC*,⁴⁹³ for example, a request for disclosure of the items referred to in an FTC announcement that a new rule was based on "extensive staff investigations, . . . accumulated experience and available studies and reports,"⁴⁹⁴ was held to be adequate. Even if an agency has not expressly referred to particular supporting documents in the announcement of a rule, there is still a "presumption that the agency [will] be able to produce [those] documents at least until the validity of its rule [has] been finally adjudicated in the courts."⁴⁹⁵

3. The Exemptions

Subsection 552(b) of the FOIA contains nine exemptions from the general disclosure mandates of subsection (a). These exemptions represent the areas in which Congress has determined that the reasons for withholding information outweigh the advantages of disclosing it.⁴⁹⁶ Thus, Congress has decided that the general public interest in disclosure is outweighed by an individual interest in privacy,⁴⁹⁷ a business interest in commercial confidentiality,⁴⁹⁸ and a government

488. 502 F.2d 122 (4th Cir.), *petition for cert. filed*, 43 U.S.L.W. 3366 (U.S. Nov. 14, 1974) (No. 74-584).

489. 357 F. Supp. 1327, 1328 (E.D. Va. 1973).

490. 502 F.2d at 125.

491. 502 F.2d at 125-26.

492. *Cf.*, *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4500 (U.S. April 28, 1975), where the Supreme Court held that if an agency *expressly* chooses to incorporate by reference a document that would have been protected under exemption five in what would otherwise be a final opinion, the document must be disclosed unless it falls within some other exemption.

493. 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

494. 424 F.2d at 937.

495. *National Cable Television Assn., Inc. v. FCC*, 479 F.2d 183, 193 (D.C. Cir. 1973).

496. Congress performed a similar balancing in the Privacy Act, 5 U.S.C.A. § 552a (Supp. Feb. 1975). For a discussion of that act see text at notes 1966-2214 *infra*.

497. 5 U.S.C. § 552(b)(6) (1970).

498. 5 U.S.C. §§ 552(b)(4), (8), (9) (1970).

interest in efficient operations and national security.⁴⁹⁹ The exemption scheme was designed to preclude judicial or agency balancing of public and private interests in deciding whether an exemption applies.⁵⁰⁰ Thus, the issue in FOIA cases is typically only whether the information requested is covered by an exemption.

The 1974 amendments to the FOIA require that agencies and courts follow a two-step analysis in determining whether requested information is exempt. They provide that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of those portions which are exempt . . ."⁵⁰¹ The Senate report makes it clear that the language of this provision was intended to authorize not only the deletion of whole sections of materials but also the deletion of names or other identifying characteristics.⁵⁰² The provision functions as a codification of present judicial interpretation of the 1967 Act.⁵⁰³ Pursuant to it, a requested document must first be examined to see whether it is protected by an exemption. If it is not exempt, the whole document must be released. If it is exempt, then the courts and the agencies must determine whether deletion of identifying details or subsections would eliminate the exemption problem and allow the remaining material to be released.⁵⁰⁴ The agencies are

499. 5 U.S.C.A. §§ 552(b)(1), (7) (Supp. Feb. 1975); 5 U.S.C. §§ 552(b)(2), (5) (1970).

500. It is the purpose of the present bill to . . . establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. It is important and necessary that the present void be filled. *It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies.*

S. REP. NO. 89-813, *supra* note 310, at 3 (emphasis added). See H.R. REP. NO. 89-1497, *supra* note 310, at 6; *Getman v. NLRB*, 450 F.2d 670, 674 n.10, 680 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971). See also K. DAVIS, *supra* note 265, § 3A.29, at 171 (Supp. 1970).

A balancing technique has been applied by the courts in exemption six cases, however. The language of that exemption, which protects the extraordinarily sensitive interest of personal privacy, mandates a determination whether there is "a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1970) (emphasis added). Courts that have balanced interests in exemption six cases have recognized that the exemption "must . . . be viewed as an exception to the general thrust of the Act." *Getman v. NLRB*, 450 F.2d 670, 674 n.10 (D.C. Cir. 1971). See text at notes 700-44 *infra*.

501. 5 U.S.C.A. § 552(b) (Supp. Feb. 1975).

502. S. REP. NO. 93-854, *supra* note 329, at 31-32. The conference committee adopted the Senate provision. See CONFERENCE REPORT, *supra* note 225, at 13.

503. S. REP. NO. 93-854, *supra* note 329, at 31-32 (citing *EPA v. Mink*, 410 U.S. 73, 89, 91 (1973); *Grumman Aircraft Engr. Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580 (D.C. Cir. 1970); *Bristol-Meyers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970)). See, e.g., *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1308 (D.D.C. 1973), modified in part, 505 F.2d 350 (D.C. Cir. 1974); cf. *Exxon Corp. v. FTC*, 384 F. Supp. 755, 763 (D.D.C. 1974) (dictum).

504. Several exemption four cases have formulated tests for determining when to delete identifying details. See, e.g., *Fisher v. Renegotiation Bd.*, 473 F.2d 109, 113 (D.C. Cir. 1972) (deletions should be made "if the information in an opinion or

required to undertake this separation themselves, subject to an in camera review by a court.⁵⁰⁵

a. *National security information.* Exemption one allows agencies to withhold materials that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."⁵⁰⁶ This exemption was intended to clarify the pre-FOIA law that allowed agencies to withhold information "in the public interest."⁵⁰⁷

Prior to its amendment in 1974, exemption one covered all matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."⁵⁰⁸ In *EPA v. Mink*, the Supreme Court held that the sole issue for judicial review under the unamended exemption was whether the documents sought had in fact been classified pursuant to an executive order.⁵⁰⁹ If an agency met its burden of proof on this purely factual issue, nondisclosure would be justified. In *Mink*, this burden was met by an affidavit of the Under Secretary of State, stating that the documents in question were properly classified.⁵¹⁰ The *Mink* decision severely limited the scope of judicial review in exemption one cases.

order is independently confidential"); *National Cable Television Assn. v. FCC*, 479 F.2d 183, 195 (D.C. Cir. 1973) (deletions should be made to protect "only that information which cannot be rendered sufficiently anonymous by deletion of the filing party's name and other identifying information"); *Pacific Architects & Engrs., Inc. v. Renegotiation Bd.*, 505 F.2d 383, 385 (D.C. Cir. 1974) (focusing on "the extent to which [the possible adverse effects of disclosure] could be reduced or eliminated by nondisclosure of the identity of the person submitting the information in dispute"). For a discussion of exemption four see text at notes 611-47 *infra*. Cf. the exemption five cases discussed in the text at notes 664-72 *infra*.

505. S. REP. NO. 93-854, *supra* note 329, at 32. See text at notes 965-88 *infra*. Even before the 1974 amendments, a number of courts used in camera review to segregate exempt from nonexempt materials. See, e.g., *National Cable Television Assn., Inc. v. FCC*, 479 F.2d 183, 194-95 (D.C. Cir. 1973); *Fisher v. Renegotiation Bd.*, 473 F.2d 109, 113 (D.C. Cir. 1972); *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1308 (D.D.C. 1973), *modified in part*, 505 F.2d 350 (D.C. Cir. 1974); *Legal Aid Soc. v. Shultz*, 349 F. Supp. 771, 777 (N.D. Cal. 1972).

506. 5 U.S.C.A. § 552(b)(1) (Supp. Feb. 1975).

507. Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946). See text at notes 313-21 *supra*.

The congressional reports accompanying the 1967 version of the FOIA do not discuss exemption one in detail. See H.R. REP. NO. 89-1497, *supra* note 310, at 9-10; S. REP. NO. 89-813, *supra* note 310, at 8. The ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, is also uninformative. See *id.* at 30.

508. 5 U.S.C. § 552(b)(1) (1970).

509. 410 U.S. 73, 74 (1973).

There was some question whether the language of the exemption required that there be a "specific" executive order covering each document sought to be withheld, 410 U.S. at 96-97 (Brennan, J., dissenting); but the Court held that one order covering broad categories of information was sufficient for the purposes of the exemption, 410 U.S. at 83. Congress apparently affirmed this interpretation when it amended the exemption in 1974. 5 U.S.C.A. § 552(b)(1) (Supp. Feb. 1975).

510. 410 U.S. at 84.

Procedural defects in classification could be remedied easily by the agencies so as to meet the "pursuant to" test, and substantive decisions to classify material could not be challenged.⁵¹¹ Furthermore, *Mink* explicitly rejected the notion that a court could conduct an in camera inspection of exemption one materials in order to separate nonsecret portions of classified records and order their disclosure.⁵¹² Thus, as interpreted by the Supreme Court, exemption one "provid[ed] no means to question an Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been."⁵¹³

Congress, dissatisfied with the *Mink* rule, amended exemption one in 1974.⁵¹⁴ The exemption now covers only agency records that "are in fact properly classified pursuant to such Executive order."⁵¹⁵ The conference report accompanying the 1974 amendments states that the proper classification language refers to "both procedural and substantive criteria contained in such Executive order."⁵¹⁶ Congress also enacted a new section of the FOIA in 1974 that expressly provides for in camera inspection of withheld material at the discretion of the trial court.⁵¹⁷

511. *Mink* apparently overruled a prior line of cases which had held that a district court could determine whether the classification of a document was arbitrary or capricious. See *Soucie v. David*, 448 F.2d 1067, 1079 n.48 (D.C. Cir. 1971); *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir. 1970).

In *Ethyl Corp. v. EPA*, 478 F.2d 47 (4th Cir. 1973), the court suggested that *Mink* does not preclude a court from rejecting an arbitrary classification. 478 F.2d at 51. This exception is not discussed in the *Mink* opinion, however. For yet another interpretation of the *Mink* rule see *Wolfe v. Froehlke*, 358 F. Supp. 1318, 1320 (D.D.C. 1973), *aff'd.*, 510 F.2d 654 (D.C. Cir. 1974) (implying that a court may be able to look beyond a procedurally proper classification if "fraud or subterfuge" is alleged).

512. 410 U.S. at 81. For a discussion of in camera review under the FOIA see the text at notes 965-88 *infra*; for a discussion of separating exempt from nonexempt materials under the FOIA see the text at notes 501-05 *supra*.

513. 410 U.S. at 95 (Stewart, J., concurring).

514. Act of Nov. 21, 1974, Pub. L. No. 93-502, § 1, 88 Stat. 1561, amending 5 U.S.C. § 552(b)(1) (1970) (codified at 5 U.S.C.A. § 552(b)(1) (Supp. Feb. 1975)).

515. The exemption also requires that the records be "authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy . . ." 5 U.S.C.A. § 552(b)(1) (Supp. Feb. 1975) (emphasis added). The current executive order, however, mandates secrecy "in the interest of the national defense or foreign relations of the United States (hereinafter collectively termed 'national security')." Exec. Order No. 11652, § 1, 3 C.F.R. 339 (1974) (emphasis added). "Foreign relations" may be a broader category than "foreign policy," see H.R. REP. No. 93-221, *supra* note 160, at 62-63, and "national security" may encompass matters unrelated to the national defense or foreign policy—for example, domestic surveillance of civil rights leaders, antiwar groups, and students. See *id.* at 85-86. Exemption under (b)(1) should be justified only if the information in question relates to foreign policy or the national defense. For criticism of the language of Executive Order No. 11652, see *id.* at 61-66, 102.

516. CONFERENCE REPORT, *supra* note 225, at 12 (emphasis added).

517. Act of Nov. 21, 1974, Pub. L. No. 93-502, § 2, 88 Stat. 1561, amending 5 U.S.C. § 552(a)(3) (1970) (codified at 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975)). See text at notes 965-88 *infra*.

These provisions have expanded the judicial role in (b)(1) cases beyond that envisioned by the dissenting Justices in *Mink*. The documents at issue in *Mink* had been classified pursuant to Executive Order 10501.⁵¹⁸ That order provided that "[t]he classification of a file or group of physically connected documents [should] be at least as high as that of the most highly classified document therein,"⁵¹⁹ and that a single document should bear one classification that was "at least as high as that of its highest classified component."⁵²⁰ Justices Brennan⁵²¹ and Douglas⁵²² would have permitted in camera inspection of the documents by the district court only to avoid this system of "classification by association." They argued that the district court should have been able to separate nonsensitive materials from sensitive materials so as to order the disclosure of the former; they would not have permitted the court substantively to challenge classification decisions. The 1974 amendments, however, apparently permit in camera inspection for the purpose of reviewing the substantive merits of classification decisions.⁵²³ Thus, under these new provisions, a court can order the disclosure of records judged "sensitive" by agency officials. Moreover, because the FOIA provides for de novo review of agency decisions to withhold information,⁵²⁴ a district court need not defer to an agency determination to classify material,⁵²⁵ and the burden will be on the agency to justify the classification.⁵²⁶

President Ford objected to the de novo review provision, citing it as one of the reasons for his veto of the 1974 FOIA amendments.⁵²⁷ In his veto message, he stated: "I am prepared to accept those aspects of the provision which would enable courts to inspect classified docu-

518. 3 C.F.R. 979 (1949-53 Comp.).

519. 3 C.F.R. 980 (1949-53 Comp.).

520. 3 C.F.R. 980 (1949-53 Comp.).

521. *EPA v. Mink*, 410 U.S. 73, 99-100 (1973).

522. 410 U.S. at 109.

523. When Congress amended the FOIA in 1974, the kind of limited in camera inspection advocated by the dissenting Justices in *Mink* was, in effect, no longer necessary. Executive Order 10501 had been replaced by a new order, providing that documents "to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use." Exec. Order 11652 § 4(A), 3 C.F.R. 343 (1974). Thus, under this new order, agencies themselves must separate nonsensitive from sensitive materials.

524. 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975). See text at notes 962-64 *infra*.

525. But see CONFERENCE REPORT, *supra* note 225, at 12: "[T]he conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases . . . will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record."

526. *Id.* at 9.

527. Cf. text at notes 330-32 *supra*.

ments and review the justification for their classification. However, the courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise."⁵²⁸ He proposed that the following proviso be added to (b)(1): "*Provided: That for matters described in [section 552(b)(1)] above, a court has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records to the complainant unless it finds that there is a reasonable basis to support the classification pursuant to such Executive order.*"⁵²⁹ The President thus conceded that there is a role for judicial review of classification decisions, but sought to shift the burden of proof. He would have allowed the courts to strike down only unreasonable and arbitrary classifications.

Although the President's proposal was contained, in substance, in the original versions of the amending bill,⁵³⁰ and is common in other areas of administrative law,⁵³¹ it was rejected by Congress. The amending bill was passed over the presidential veto.⁵³² Apparently, Senator Muskie prevailed in his argument that a reasonableness standard "would force judges to conduct the proceedings . . . in such a way that the presumption of validity for a classification marking would be overwhelming."⁵³³

The struggle over the (b)(1) exemption in 1974 is symptomatic of the continuing constitutional struggle between the executive and Congress for domination in the areas of national defense and foreign policy.⁵³⁴ The executive traditionally has had significant freedom in these areas, and Congress, spurred to action by revelations of executive abuse of authority, is attempting to curtail that freedom.⁵³⁵ Exemption one represents such an effort.

528. 10 WEEKLY COMP. OF PRES. DOCS. 1318 (1974).

529. Letter from President Ford to Representative Carl Albert, Oct. 25, 1974, at 3-5 (proposing amendments to the FOIA) [hereinafter Ford Amendments].

530. H.R. REP. NO. 93-876, *supra* note 329, at 7; S. REP. NO. 93-854, *supra* note 329, at 16. The pertinent part of the proposed Senate bill read:

If there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by a statute or Executive order referred to in subsection (b)(1) of this section, the Court shall sustain such withholding unless, following its in camera examination, it finds the withholding is without a reasonable basis under such criteria.

S. 2543, 93d Cong., 2d Sess. § (b)(2) (1974) in S. REP. NO. 93-854, *supra*, at 37. In one of the few changes made on the floor of the Senate, this provision was stricken from the final Senate bill. 120 CONG. REC. S9328 (daily ed. May 30, 1974).

531. See 4 K. DAVIS, *supra* note 265, § 30.05 (1958).

532. See text at notes 330-32 *supra*.

533. 120 CONG. REC. S9319 (daily ed. May 30, 1974).

534. For example, it has been proposed that Congress create a statutory classification system. H.R. REP. NO. 93-221, *supra* note 160, at 94-99, 103. See text at notes 215-61 *supra*.

535. See generally H.R. Doc. No. 90-298, 90th Cong., 2d Sess. (1968).

b. *Personnel rules.* Exemption two of the FOIA protects matters that are "related solely to the internal personnel rules and practices of an agency."⁵³⁶ The House⁵³⁷ and Senate⁵³⁸ reports accompanying the Act reveal congressional disagreement as to the scope of the exemption; the cases construing it reflect this conflict.

The reports of the hearings on the House bill indicate that the members of the House Subcommittee on Government Information intended that the exemption be construed to cover agency operating rules and manuals of procedure.⁵³⁹ One witness at those hearings pointed out to the Subcommittee that the wording of the exemption would have to be changed to ensure such a construction.⁵⁴⁰ The House, however, did not amend the section; instead, it adopted the Senate version of the bill.⁵⁴¹ The House report states that the exemption applies to "[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners"⁵⁴² but does not cover matters of internal agency management such as "employee relations and working conditions and routine administrative procedures."⁵⁴³

The Senate's interpretation of exemption two is quite different from that of the House. The Senate report states that the exemption "relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like."⁵⁴⁴ The Senate, therefore, intended the exemption to apply to only those routine employer-employee rules that the House assumed should be disclosed. Conversely, the Senate assumed that any person would be entitled to access to agency operating rules and manuals of procedure, while the House intended that those items be exempt.

The *Attorney General's Memorandum* adopted the House interpretation of the exemption and argued that the Senate's construction would negate the effectiveness of several agency functions:

An agency cannot bargain effectively for the acquisition of lands

536. 5 U.S.C. § 552(b)(2) (1970).

537. H.R. REP. NO. 89-1497, *supra* note 310, at 10.

538. S. REP. NO. 89-813, *supra* note 310, at 8.

539. 3 *Federal Public Records Law, Hearings on H.R. 5012-21, 5377, 5046, 5520, 5583, 6172, 6739, 7010, and 7161 Before the Subcomm. on Government Information of the House Comm. on Government Operations*, 89th Cong., 1st Sess., pt. 1, at 29-30 (1965) [hereinafter *1965 House Hearings*].

540. *Id.* at 29-30 (testimony of N. Schlei, Assistant Attorney General, Office of Legal Counsel, Department of Justice).

541. 113 CONG. REC. 8109, 14,056 (1967).

542. H.R. REP. NO. 89-1497, *supra* note 310, at 10.

543. *Id.*

544. S. REP. NO. 89-813, *supra* note 310, at 8.

or services or the disposition of surplus facilities if its instructions to its negotiators and its offers to prospective sellers or buyers are not kept confidential. Similarly, an agency must keep secret the circumstances under which it will conduct unannounced inspections or spot audits of supervised transactions to determine compliance with regulatory requirements. The moment such operations become predictable, their usefulness is destroyed.⁵⁴⁵

Courts have been confronted with two principal issues in exemption two cases. The first issue is whether the Senate or the House interpretation of the exemption should be followed. The second issue is whether, assuming the Senate approach is taken, those matters alluded to in the *Attorney General's Memorandum* must be disclosed.

The majority of cases that have considered this exemption has adopted the Senate interpretation. Most of these cases, however, did not involve the kind of information that the House report and the *Attorney General's Memorandum* expressly intended to protect from disclosure. For example, in a suit by a consumer's group to obtain the results of a hearing aid testing program conducted by the Veterans Administration,⁵⁴⁶ the court held that exemption two was inapplicable since the material sought did not apply to personnel matters.⁵⁴⁷ The court acknowledged both the House and Senate reports as well as the *Attorney General's Memorandum*, but adopted the Senate's interpretation on the ground that its report was the only one considered by both houses of Congress.⁵⁴⁸ The case, however, did not involve information that, if revealed, would interfere with the agency's regulatory function.

Similarly, *Stokes v. Hodgson*⁵⁴⁹ dealt with a demand for the disclosure of training manuals and aids of the Occupational Safety and Health Administration (OSHA). The manuals contained discussions of:

. . . the structure of OSHA, the legal framework in which OSHA operates, the obligations and rights of employers and employees under OSHA, the specific duties of compliance inspectors and the best methods for carrying out these duties, the detailed health and safety standards of the Occupational Safety and Health Act of 1970, the proper emphasis to be placed on different types of health and

545. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 31. See generally *id.* at 30-31.

546. *Consumers Union of United States, Inc. v. Veterans Admn.*, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (1971). See *Long v. IRS*, 349 F. Supp. 871 (W.D. Wash. 1972); *Benson v. GSA*, 289 F. Supp. 590 (W.D. Wash. 1968), *affd.*, 415 F.2d 878 (9th Cir. 1969).

547. 301 F. Supp. at 801.

548. 301 F. Supp. at 801.

549. 347 F. Supp. 1371 (N.D. Ga. 1972), *affd. sub nom. Stokes v. Brennan*, 476 F.2d 699 (5th Cir. 1973).

safety violations, and the proper methods to assess penalties for health and safety violations.⁵⁵⁰

The district court discussed the conflict in the House and Senate reports and concluded that the Senate's version was more consistent with the plain meaning of the statute.⁵⁵¹ Exemption two was interpreted to exempt only "general intra-agency housekeeping rules and practices such as those related to work schedules, office assignment, parking facilities, leaves of absence and the like."⁵⁵² In affirming the decision on appeal, the Fifth Circuit agreed that the Senate's interpretation of the exemption was the better one.⁵⁵³

The Senate's interpretation of exemption two is consistent with the stated purpose of the FOIA to provide greater access to information⁵⁵⁴ and thus has become the interpretation most widely adopted by the courts. The House report and the *Attorney General's Memorandum* expressed the fear that such a narrow interpretation of the exemption would force the disclosure of information that must be kept secret in order to enforce efficiently agency regulations. This fear, however, can be dispelled by judicial construction of the exemption.

A distinction has been drawn between *administrative* staff manuals, which must be released, and *law enforcement* manuals, which need not be released,⁵⁵⁵ in court decisions interpreting section 552(a)(2)(C) of the Act.⁵⁵⁶ This distinction could be applied in exemption two cases. The issues whether a document is covered by (a)(2)(C) and whether it is protected by exemption two have generally arisen in the same cases,⁵⁵⁷ and at least one court has applied exemption two to protect law enforcement manuals. In *Cuneo v. Laird*,⁵⁵⁸ the court held that a Defense Contract Audit Agency manual containing instructions to the auditor concerning the items to be audited, the thoroughness of the audit, and the frequency of the

550. 347 F. Supp. at 1373.

551. 347 F. Supp. at 1374.

552. 347 F. Supp. at 1373.

553. *Stokes v. Brennan*, 476 F.2d 699, 703 (5th Cir. 1973).

554. See text at notes 308-12 *supra*.

555. See text at notes 418-27 *supra*.

556. 5 U.S.C. § 552(a)(2)(C) (1970) provides: "Each agency, in accordance with published rules, shall make available for public inspection and copying . . . administrative staff manuals . . . that affect a member of the public . . ."

557. See, e.g., *Hawkes v. IRS*, 467 F.2d 787 (6th Cir. 1972); *Polymers v. NLRB*, 414 F.2d 999 (2d Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970); *Stokes v. Hodgson*, 347 F. Supp. 1371 (N.D. Ga. 1972), *affd. sub nom. Stokes v. Brennan*, 476 F.2d 699 (5th Cir. 1973); *Tietze v. Richardson*, 342 F. Supp. 610 (S.D. Tex. 1972); *City of Concord v. Ambrose*, 333 F. Supp. 958 (N.D. Cal. 1971).

558. 338 F. Supp. 504 (D.D.C. 1972), *remanded sub nom. Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973).

audit was exempt under (b)(2).⁵⁵⁹ The court felt that forcing disclosure of this information would allow a contractor to claim unallowable costs in areas not likely to be audited, and otherwise to frustrate the purpose of the audit.⁵⁶⁰ Its decision to protect the material from disclosure was based on its conclusion, as a matter of law, that the manual fell within the (b)(2) exemption. On appeal,⁵⁶¹ the plaintiff dropped his request for those portions of the manual denied disclosure by the district court, and the government conceded that if the manual contained administrative material,⁵⁶² that material would have to be disclosed.⁵⁶³ Thus, neither the (b)(2) exemption nor the administrative/law enforcement dichotomy was discussed.⁵⁶⁴

One problem in applying the administrative/law enforcement distinction to exemption two is that, on its face, the law enforcement manual exception applies only to (a)(2)(C) requirements for public inspection. It is not clear if it applies to the publication and disclosure requirements of (a)(1) or (a)(3). Some courts have read the law enforcement manual exception into these other subsections,⁵⁶⁵ but the literal language of the FOIA makes such an implication difficult to justify. The optimal solution to this problem would be to move the law enforcement manual exception into subsection (b), thereby making it applicable to all of the disclosure requirements of subsection (a).⁵⁶⁶

If the Senate's narrow interpretation of exemption two is generally adopted, and if subsection (a)(2) of the Act is interpreted to cover law enforcement manuals, there may be no need for exemption two. It could be argued in support of retaining (b)(2) that, since the information it exempts is not of interest to the public because it relates only to matters of concern between agencies and their employees,⁵⁶⁷ agencies should not have to be harassed by requests

559. 338 F. Supp. at 506.

560. 338 F. Supp. at 506.

561. *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973).

562. *See Hawkes v. IRS*, 467 F.2d 787, 795 (6th Cir. 1972); *quoted in note 418 supra*.

563. 484 F.2d at 1089-90.

564. The case was remanded for a determination of which sections of the manual would have to be disclosed. 484 F.2d at 1092.

565. *See, e.g., United States v. Imbrunone*, 379 F. Supp. 256, 261 (E.D. Mich. 1974).

566. Such an exception could contain limitations similar to those included in the recent amendment to exemption seven, the investigatory records exemption. *See text at note 745 infra*.

567. *But cf. Rose v. Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3445 (Feb. 18, 1975) (No. 74-489), where the plaintiffs sought disclosure of certain Air Force Academy disciplinary files. The circuit court found that "case summaries of Honor and Ethics Code adjudications clearly fall outside [exemption two's] ambit. Such summaries have a substantial potential for public interest outside the Government." 495 F.2d at 265.

for insignificant information. On the other hand, there will probably be few requests for (b)(2) information if (b)(2) is interpreted narrowly, and the disclosure of such information when requested will not interfere with agency functions. Mere administrative convenience is not an important enough interest to outweigh the value of public access to information. The elimination of the (b)(2) exemption would thus further the basic policy behind the FOIA without sacrificing any substantial governmental interest.

c. *Other statutes.* Exemption three applies to matters that are "specifically exempted from disclosure by statute."⁵⁶⁸ Neither the House report nor the Senate report comments extensively on this section. The Senate report merely restates the section,⁵⁶⁹ while the House report adds that "[t]here are nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provision of [the FOIA]."⁵⁷⁰ The *Attorney General's Memorandum* expands on the brief statement in the House Report:

The reference to "nearly 100 statutes" apparently was inserted in the House report in reliance upon a survey conducted by the Administrative Conference of the United States in 1962. This survey concluded that there were somewhat less than 100 statutory provisions which specifically exempt from disclosure, prohibit disclosure except as authorized by law, provide for disclosure only as authorized by law, or otherwise protect from disclosure. The reference therefore indicates an intention to preserve whatever protection is afforded under other statutes, whatever their terms.⁵⁷¹

The *Memorandum* then lists a number of statutes that, in the Attorney General's opinion, will protect certain matters from disclosure.⁵⁷²

568. 5 U.S.C. § 552(b)(3) (1970).

569. S. REP. NO. 89-813, *supra* note 310, at 9.

570. H.R. REP. NO. 89-1497, *supra* note 310, at 10.

571. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 31-32. Many courts have refused to accept the Attorney General's interpretation of exemption three. See, e.g., *Cutler v. CAB*, 375 F. Supp. 722, 723 n.1 (D.D.C. 1974): "The Attorney General's Memorandum . . . indicated that Congress had been relying upon a 1962 survey by the Administrative Conference of the United States, but the Conference has since announced that no such survey was ever conducted. Memorandum to Staff Attorneys by John V. Cushman, Executive Director, Administrative Conference of the United States, March 15, 1974." But see *FAA v. Robertson*, 43 U.S.L.W. 4833, 4837 (U.S. June 24, 1975) (citing the quoted portion of the *Memorandum*).

572. *Id.* at 32. The statutes listed are 18 U.S.C. § 1905 (1970), see text at notes 573-80 *infra*; 26 U.S.C. § 6103 (1970), see text at notes 585-89 and note 585 *infra*; 42 U.S.C. § 2000e-8 (1970), which prescribes criminal penalties for disclosure of any information received by the EEOC pursuant to its authority under this section of the code; 42 U.S.C. §§ 2161-66 (1970), controlling atomic energy information; 43 U.S.C. § 1398 (1970), providing that information received "on a confidential basis" from witnesses before the Public Land Law Review Commission shall not be made public; 44 U.S.C. § 397 (1965), as amended, 44 U.S.C. § 2101-10 (1970), providing that the National

The greatest problem that courts have faced in exemption three cases has been how to interpret the word "specifically." Does it require that a statute identify with particularity every document that is exempt, or is it enough that the statute empowers an agency head to determine what documents shall be withheld?

The *Attorney General's Memorandum* cited 18 U.S.C. § 1905 as one statute that would exempt documents pursuant to (b)(3).⁵⁷³ Section 1905 provides a fine or imprisonment for any employee of the United States government who "publishes, divulges, discloses or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment"⁵⁷⁴ A significant number of cases, however, have concluded (sometimes in dicta) that section 1905 does not *specifically* exempt any information, and hence does not protect material from disclosure under exemption three.⁵⁷⁵ For example, one court found that "unlike other statutes which specifically define the range of disclosable information . . . section 1905 merely creates a criminal sanction for the release of 'confidential information.' Since this type of information is already protected from disclosure under the Act by exemption four, section 1905 should not be read to expand this exemption, especially because the Act requires that the exemptions be narrowly construed."⁵⁷⁶ Similarly, in two cases involving requests for disclosure of SEC documents, the courts rejected SEC attempts to use the (b)(3) exemption and 18 U.S.C. § 1905. In *M. A. Shapiro & Co., Inc. v. SEC*,⁵⁷⁷ the court stated that exemption three did not relate "to a statute that generally prohibits all disclosures of confi-

Archivist shall restrict access to materials held by him to the same extent that access was restricted by law while the material was in the hands of an agency; and 50 U.S.C. § 403g (1970), which exempts from disclosure documents relating to the CIA's "organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency."

573. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 32.

574. 18 U.S.C. § 1905 (1970). For the full text of this statute see note 1082 *infra*.

575. See, e.g., *Charles River Park "A", Inc. v. HUD*, Civil No. 73-1930, slip op. at 8 (D.C. Cir. March 10, 1975); *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 776 (D.D.C. 1974); *Didlow v. Volpe*, 362 F. Supp. 1321, 1323-24 (D.D.C. 1973), *revd. on other grounds sub nom. Didlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974), *cert. denied*, 43 U.S.L.W. 3256 (U.S. Oct. 29, 1974); *Consumers Union of United States, Inc. v. Veterans Admn.*, 301 F. Supp. 796, 801-02 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

576. *Grumman Aircraft Engr. Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580 n.5 (D.C. Cir. 1970) (*Grumman I*), *on remand* 325 F. Supp. 1146 (D.D.C. 1971), *affd.*, 482 F.2d 710 (D.C. Cir. 1973) (*Grumman II*), *revd.*, 43 U.S.L.W. 4502 (U.S. April 28, 1975). Only *Grumman I* dealt with the exemption three issue. See *Robertson v. Butterfield*, 498 F.2d 1031 (D.C. Cir. 1974), *revd. sub nom. FAA v. Robertson*, 43 U.S.L.W. 4833 (U.S. June 24, 1975), where the court noted that 18 U.S.C. § 1905 "does not fall within the ambit of Exemption (3)." 498 F.2d 1033 n.6.

577. 339 F. Supp. 467 (D.D.C. 1972).

dential information,"⁵⁷⁸ and in *Frankel v. SEC*,⁵⁷⁹ the court pointed out that permitting material to be exempted by (b)(3) and 18 U.S.C. § 1905 begged the initial question of the confidentiality of the material.⁵⁸⁰

One other statute that has been held not to satisfy the (b)(3) exemption is 38 U.S.C. § 216(a), which directs the Veterans Administration to conduct research in the field of "prosthesis, prosthetic appliances, orthopedic appliances and sensory devices."⁵⁸¹ In an action to compel the VA to disclose the results of its hearing aid testing program,⁵⁸² the VA relied, in part, on exemption three and section 216(a)(2). The latter section provides: "In order that the unique investigative materials and research data in the possession of the Government may result in improved prosthetic appliances for all disabled persons, the Administrator may make available to any person the results of his research."⁵⁸³ The court in this case summarily rejected the VA's argument, holding that the statute did not "specifically" exempt the materials sought.⁵⁸⁴ Indeed, this statute authorizes the disclosure of information.

Several statutes that mandate against the disclosure of narrowly defined materials have been held to protect those materials from disclosure under exemption three. For example, federal income tax returns, and the information contained in those returns, are protected by statute from disclosure to the public.⁵⁸⁵ In *Tax Analysts and Advocates v. IRS*,⁵⁸⁶ the court held that technical advice memoranda, which are "prepared in response to an inquiry by a District Director as to the treatment of a specific set of facts relating to a tax return filed by a named taxpayer involving either an audit or

578. 339 F. Supp. at 470.

579. 336 F. Supp. 675 (S.D.N.Y. 1971), *revd. on other grounds*, 460 F.2d 813 (2d Cir. 1972), *cert. denied*, 409 U.S. 889 (1972).

580. 336 F. Supp. at 678-79.

581. 38 U.S.C. § 216(a)(1) (1970).

582. *Consumers Union of United States, Inc. v. Veterans Admn.*, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

583. 38 U.S.C. § 216(a)(2) (1970).

584. 301 F. Supp. at 802.

585. INT. REV. CODE OF 1954, § 6103(a) provides: "Returns made with respect to taxes . . . shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President." Additionally, INT. REV. CODE OF 1954, § 7213(a)(1) states in part: "It shall be unlawful for any officer or employee of the United States . . . to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof . . . to be seen or examined by any person except as provided by law"

586. 505 F.2d 350 (D.C. Cir. 1974).

in connection with the taxpayer's claim for refund or credit of taxes,"⁵⁸⁷ were exempt from disclosure under (b)(3).⁵⁸⁸ The court implicitly accepted the fact that the statutes concerned satisfied the specificity requirement of (b)(3) and focused instead on whether the information sought fell within the scope of those statutes.⁵⁸⁹

Another narrowly drawn statute that has been held to protect information under exemption three is 35 U.S.C. § 122, providing for the confidentiality of patent applications.⁵⁹⁰ In *Misegades & Douglas v. Schuyler*,⁵⁹¹ the court interpreted the term "patent application" in section 122 to include a form used by the Patent Office for processing patents, and held that such forms were protected from disclosure under exemption three. In a later case, *Sears v. Gottschalk*,⁵⁹² the court interpreted section 122 to include abandoned patent applications and denied disclosure on the basis of exemption three.

Courts have reached conflicting results with respect to other statutes that purport to protect information from disclosure. For example, 42 U.S.C. § 1306⁵⁹³ exempts from disclosure any materials "obtained at any time by the Secretary of Health, Education and Welfare, or the Secretary of Labor . . . in the course of discharging their respective duties under this chapter."⁵⁹⁴ In a suit by the California Attorney General to compel disclosure of HEW reports concerning the performance of nursing homes receiving federal aid,⁵⁹⁵ the court held that when a statute such as 42 U.S.C. § 1306 allows an agency head to determine by regulations whether certain information should be available, exemption three will prevent the disclosure of such information: "It appears to us that when Congress used the word 'specifically' it was requiring no more than that the exemption be found in the words of the statute rather than the implication of it We think the words of Section 1306 . . . are

587. 505 F.2d at 355.

588. 505 F.2d at 355. The court also held that certain letter rulings were not encompassed by either section 6103 or section 7213 and so should be disclosed. 505 F.2d at 354-55. See Note, 8 U. MICH. J. L. REF. 329, *supra* note 333, at 334-36, 341.

589. The Sixth Circuit recently took the same approach in *Fruehauf Corp. v. IRS*, 43 U.S.L.W. 2530 (June 9, 1975), as did the district court in *B & C Tire Co., Inc. v. IRS*, 376 F. Supp. 708 (N.D. Ala. 1974).

590. This statute provides: "Applications for patents shall be kept in confidence by the Patent Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner."

591. 328 F. Supp. 619 (E.D. Va. 1971), *appeal dismissed*, 456 F.2d 255 (4th Cir. 1972).

592. 357 F. Supp. 1327 (E.D. Va. 1973), *affd.*, 502 F.2d 122 (4th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3366 (U.S. Nov. 14, 1974) (No. 74-584).

593. 42 U.S.C. § 1306 (1970), *as amended*, (Supp. III, 1973).

594. 42 U.S.C. § 1306(a) (1970).

595. *California v. Weinberger*, 505 F.2d 767 (9th Cir. 1974).

words allowing the Secretary to relax the absolute prohibition established by Congress.”⁵⁹⁶

Several other courts, however, have rejected agency arguments based on exemption three and section 1306. In a case concerning the same reports as those sought by the state of California,⁵⁹⁷ the Third Circuit ordered disclosure. The court stated: “We agree, as did the district court, that the exempting statute must prescribe some basis upon which the Secretary is to decide. Otherwise, there would be no escape from the unacceptable conclusion that the word ‘specifically’ as used in section 552(b)(3), is surplusage.”⁵⁹⁸ In *Schechter v. Weinberger*,⁵⁹⁹ in which the plaintiff sought disclosure of certain Medicare reports, the court also rejected an agency argument based on exemption three and section 1306, stating that “[r]ead as a whole, section 1306 vests complete, uncharted discretion with respect to disclosure in the Secretary rather than being a specific exemption by statute.”⁶⁰⁰ The above cases demonstrate that courts generally have construed exemption three so as to effectuate the FOIA’s policy of providing greater public access to government information.⁶⁰¹ Thus, they have attempted to distinguish between statutes that specifically define materials to be withheld and statutes that only broadly mandate withholding. In its recent decision in *FAA v. Robertson*,⁶⁰² however, the Supreme Court has indicated that this approach to exemption three is incorrect.

The plaintiffs in *Robertson* brought suit under the FOIA to compel the disclosure of reports compiled by the FAA concerning the operating performance of commercial airlines. The FAA refused to turn over the reports, claiming that the documents were protected by 49 U.S.C. § 1504, which permits any person to object to the public disclosure of information contained in “any application, report, or document filed pursuant to the provisions of [the Civil

596. 505 F.2d at 768. This opinion affirmed *California v. Richardson*, 351 F. Supp. 733 (N.D. Cal. 1972), where the court stated, “Certainly § 1306 does not itself single out for nondisclosure any specified documents, as does, for example, 26 U.S.C. § 6103. But § 1306 is considerably more specific than 18 U.S.C. § 1905, which only forbids the disclosure of certain information when disclosure is not otherwise authorized by law.” 351 F. Supp. at 735. See K. DAVIS, *supra* note 265, § 3A.18, at 146 (Supp. 1970).

597. *Stretch v. Weinberger*, 495 F.2d 639 (3d Cir. 1974).

598. 495 F.2d at 640.

599. 506 F.2d 1275 (D.C. Cir. 1974).

600. 506 F.2d at 1277. See *Dellums v. HEW*, Civil No. 181-72 (D.D.C., July 11, 1973) quoted in *Schechter v. Weinberger*, 506 F.2d at 1277: “[Section 1306] does not specifically exempt the documents sought from disclosure, but rather is a blanket exclusion on disclosure of all files, records and reports compiled under the Social Security Act. That blanket exemption is in direct contravention of the liberal disclosure requirement of the Freedom of Information Act, and cannot qualify as a specific exemption within the meaning of the Act.”

601. See text at notes 308-12 *supra*.

602. 43 U.S.L.W. 4833 (U.S. June 24, 1975).

Aeronautics Act] or of information obtained by the [Civil Aeronautics] Board or the Administrator [of the FAA] pursuant to the provisions of [the Act]" and provides that upon receipt of such an objection, the Board or the Administrator can withhold the information when "in their judgment, the disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public." The district court held that the plaintiffs were entitled to the reports "as a matter of law"⁶⁰³ and granted the plaintiffs' motion for summary judgment. The Court of Appeals for the District of Columbia affirmed that part of the lower court's order relating to exemption three,⁶⁰⁴ after concluding that "the public interest standard of [49 U.S.C. § 1504] is not a specific exemption by statute within the meaning of Exemption (3)"⁶⁰⁵ The Supreme Court reversed.⁶⁰⁶ Stating that "the relevant portions of . . . exemption [three] are unclear and ambiguous,"⁶⁰⁷ the Court went on to find evidence in the legislative history of the exemption indicating that 15 U.S.C. § 1504 is properly within its scope.⁶⁰⁸ Although the Court could have stopped there,⁶⁰⁹ it did not. In an apparent attempt to guide the lower courts in interpreting exemption three, the Court implied that it would be incorrect to distinguish between specific and nonspecific statutes for the purpose of the exemption:

The respondents can prevail only if the [FOIA] is to be read as repealing by implication all existing statutes "which restrict public access to specific public records." [H.R. Rep. No. 89-1497, 89th Cong., 2d Sess. 10 (1966)]. The term "specific" as there used cannot

603. 43 U.S.L.W. 4835 (quoting from the unreported district court opinion).

604. *Robertson v. Butterfield*, 498 F.2d 1031, 1036 (1974). The circuit court remanded the case for consideration whether exemption seven applied to the reports in question.

605. 498 F.2d at 1036. *Accord*, *Cutler v. CAB*, 375 F. Supp. 722, 724 (D.D.C. 1974). *Contra*, *Evans v. Department of Transp.*, 446 F.2d 821, 824 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

606. 43 U.S.L.W. at 4837.

607. 43 U.S.L.W. at 4836.

608. The legislative history revealed that "when the Civil Aeronautics Board brought [15 U.S.C. § 1504] to the attention of both the House and Senate Hearings of 1965, and expressed the agency interpretation that the provision was encompassed within Exemption 3, no question was raised or challenge made to the agency view of the impact of that exemption." 43 U.S.L.W. at 4836-37 (footnote omitted).

609. The Court in *Robertson* could have distinguished 49 U.S.C. § 1504 from other statutes allowing the withholding of information either by focusing *solely* on the fact that the statute was brought to the attention of the legislature during the hearings on exemption three, *see* note 608 *supra*, or by finding that the statute's provision of a standard for withholding information, *see* text following note 602 *supra*, sufficiently restricted agency discretion so as to render 49 U.S.C. § 1504 "specific" within the meaning of the exemption. *See* *Evans v. Department of Transp.*, 446 F.2d 821, 824 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972). The Court did not so distinguish this statute, however. In fact the Court characterized the discretion granted to the FAA under 49 U.S.C. § 1504 as "broad" in "both nature and scope." 43 U.S.L.W. at 4837.

be read as meaning that [exemption three] applies only to documents specified, *i.e.*, by naming them precisely or by describing the category in which they fall. To require this interpretation would be to ask of Congress a virtually impossible task. Such a construction would also imply that Congress had undertaken to reassess every delegation of authority to withhold information which it had made before the passage of [the FOIA]—a task which the legislative history shows it clearly did not undertake.⁶¹⁰

Prior to the Supreme Court's decision in *Robertson*, one could have said with assurance that nonspecific statutes, such as those exempting from disclosure all information received by an agency, or those granting an agency uncontrolled discretion to withhold information, would not be found to fall within the scope of exemption three. The *Robertson* opinion appears to shift the judicial inquiry in exemption three cases from the question whether a statute is specific to the narrower question whether a statute in fact mandates the withholding of information. To the extent that this shift frustrates the full disclosure policy of the FOIA, it is unfortunate.

d. *Trade secrets*. Section 552(b)(4) of the FOIA exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁶¹¹ The language of this exemption provides little guidance for determining its scope.⁶¹² The legislative history of the exemption indicates that its basic purpose is to protect business confidentiality.⁶¹³ Although its language and

610. 43 U.S.L.W. at 4837. An even stronger statement to this effect was made by the concurring Justices in *Robertson*: "As matters now stand, when an agency asserts a right to withhold information based on a specific statute of the kind described in Exemption 3, 'the only question to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be.' *Environmental Protection Agency v. Mink*, 410 U.S. 73, 95 n.[*] (concurring opinion)." 43 U.S.L.W. at 4838 (footnote omitted).

611. 5 U.S.C. § 552(b)(4) (1970).

612. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 32. See also Note, *Public Disclosure of Confidential Business Information Under the Freedom of Information Act: Toward a More Objective Standard*, 60 CORNELL L. REV. 109, 112-13 (1974); 88 HARV. L. REV. 470, 472-73 (1974). Compare K. DAVIS, *supra* note 265, § 3A.19, at 146 (Supp. 1970).

613. See S. REP. NO. 89-813, *supra* note 310, at 9:

This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges. Specifically it would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan.

See also H.R. REP. NO. 89-1497, *supra* note 310, at 10:

This exemption would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would

legislative history would permit exemption four to apply to a wide range of information,⁶¹⁴ the courts have generally limited its application.⁶¹⁵

The awkward language of the exemption has made it difficult for courts to determine the general categories of information that the exemption covers.⁶¹⁶ For example, there was an initial controversy over whether noncommercial information was protected from disclosure by exemption four.⁶¹⁷ Now, however, courts generally

include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.

Concern about the harmful effects that disclosure of some types of business information could have upon the competitive position of a supplier was expressed in the hearings on the FOIA. For example, a company applying for a Small Business Administration loan would not want its possibly shaky financial position revealed. *Hearings on S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 101-02 (1963) (remarks of Senator Burdick) [hereinafter 1963 Senate Hearings].

614. *Consumers Union of United States, Inc. v. Veterans Admn.*, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971). See H.R. REP. NO. 89-1497, *supra* note 310, at 10.

615. See *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971) (limiting the exemption to commercial information); *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 768-70 (D.C. Cir. 1974) (limiting "confidential" to information whose disclosure would adversely affect competitive position or government acquisition of information); text at notes 616-18, 635-38 *infra*; H.R. REP. NO. 92-1419, *supra* note 327, at 71.

616. See, e.g., *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 594 (D.P.R. 1967), where the court found that exemption four "deals with documents, given by persons to government agencies, which are of a privileged or confidential nature," and held that NLRB investigatory records were protected from disclosure by the exemption. The court did not even consider whether these records were commercial or financial, but exempted them simply because they were of a "confidential nature."

In pointing out the procedural and structural defects of this exemption, the Attorney General listed several possible interpretations: "The exemption can be read, for example, as covering three kinds of matters: i.e., 'matters that are [a] trade secrets and [b] commercial or financial information obtained from any person and [c] privileged or confidential.' . . . Alternatively, clause [c] can be read as modifying clause [b]. Or, from a strictly grammatical standpoint, it could be argued that all three clauses have to be satisfied for the exemption to apply." ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 32. See also K. DAVIS, *supra* note 265, § 3A.19, at 146 (Supp. 1970).

617. The Attorney General concluded that because "Congress neither intended to exempt all commercial and financial information on the one hand, nor to require disclosure of all other privileged or confidential information on the other," ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 34, the exemption's protection should extend to all "information given in confidence." *Id.* at 32. The examples of protected information provided in the legislative reports support the Attorney General's interpretation. "[The exemption] would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily sub-

accept the following interpretation of the exemption: "[T]his section exempts only (1) trade secrets and (2) information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential. The exemption given by Congress does not apply to information which does not satisfy the three requirements stated in the statute."⁶¹⁸

The first category of information protected by exemption four, trade secrets, has been the least controversial. The courts and the agencies were familiar with this category of confidential information⁶¹⁹ and, therefore, general agreement on the meaning and application of the term was easily reached.⁶²⁰

ject to doctor-patient, lawyer-client, lender-borrower, and other such privileges." S. REP. NO. 89-813, *supra* note 310, at 9. The House Report uses identical language. H.R. REP. NO. 89-1497, *supra* note 310, at 10. However, these reports are not determinative of this issue because they do not reflect the addition of the words "commercial or financial" to the language of the original bill. See *Consumers Union of United States, Inc. v. Veterans Admn.*, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

618. *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971), *quoting* *Consumers Union of United States, Inc. v. Veterans Admn.*, 301 F. Supp. 796, 802 (S.D.N.Y. 1969). Application of this test has resulted in protecting several items. See, e.g., *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971) (documents submitted to the FTC concerning a proposed merger); *Westinghouse Elec. Corp. v. Schlesinger*, Civil No. 118-74-A (E.D. Va. April 2, 1974) (affirmative action reports filed by employer); *Sears v. Gottschalk*, 357 F. Supp. 1327, 1329 (E.D. Va. 1973), *affd.*, 502 F.2d 122 (4th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3366 (U.S. Dec. 12, 1974) (No. 74-584) (patent applications). But see *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 296 (C.D. Cal. 1974), which found that such affirmative action reports were not protected by exemption four because they did not meet the "confidential" test.

Under this test, other items have been held not to fall within the scope of the exemption. See, e.g., *Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 244-45 (D.C. Cir. 1974), *cert. denied*, 43 U.S.L.W. 3601 (U.S. May 12, 1975) (scientific "research designs" submitted as part of grant application not covered because not commercial or confidential); *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971) (lists of names and addresses not covered because not financial or commercial, and probably not confidential); *Rabbitt v. Department of the Air Force*, 383 F. Supp. 1065, 1069 (S.D.N.Y. 1974) (statements by government witnesses in investigation of an airplane crash not covered because not commercial or financial); *Brockway v. Department of the Air Force*, 370 F. Supp. 738, 741 (N.D. Iowa 1974) (statements by government witnesses in the investigation of an airplane crash not covered because not obtained from a person, since witnesses were government officials); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 471 (D.D.C. 1972) (information collected by the SEC on off-board trading not covered because not confidential); *Consumers Union of United States, Inc. v. Veterans Admn.*, 381 F. Supp. 796, 803 (S.D.N.Y. 1969) (results of hearing aid tests conducted at VA hospitals not covered because not obtained from a person).

619. The standard legal definition of "trade secret" accepted in FOIA cases is "an unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities." *United States ex rel. Norwegian Nitrogen Prods. Co. v. United States Tariff Commn.*, 6 F.2d 491, 495 (C.A.D.C. 1925), *revd. on other grounds*, 274 U.S. 106 (1927). See *Consumers Union of United States, Inc. v. Veterans Admn.*, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

620. See, e.g., *Sears v. Gottschalk*, 357 F. Supp. 1327, 1329 (E.D. Va. 1973), *affd.*,

The scope of the second category of information protected by the exemption, information that is "commercial or financial," "obtained from a person," and "privileged or confidential," has proved to be more difficult to define.

The phrase "obtained from a person" has generally been interpreted to mean that the information in question must have come from a source outside the government.⁶²¹ Thus, information generated within an agency must be disclosed regardless of its confidential or commercial nature⁶²² and regardless of whether it was subsequently transferred to a second agency.⁶²³ This rule could operate harshly on a person who is the subject of agency-generated information. Thus, it has been suggested that the exemption be amended to allow the courts more flexibility in this area.⁶²⁴

Financial or commercial information that has been obtained from a person must also be "privileged or confidential" to fall within the scope of exemption four. The legislative history indicates that "privileged" refers to the traditional common-law privileges.⁶²⁵ If this is all that "privileged" was intended to mean, however, its inclusion in the exemption appears to have been unnecessary. Infor-

502 F.2d 122 (4th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3366 (U.S. Dec. 12, 1974) (No. 74-584).

621. *Consumers Union of United States, Inc. v. Veterans Admn.*, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971); *Grumman Aircraft Engr. Corp. v. Renegotiation Bd.*, 425 F.2d 578 (D.C. Cir. 1970) (*Grumman I*). Cf. *GSA v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969). This interpretation is consistent with the APA's definition of "person": "'Person' includes an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2) (1970). See text at notes 459-60 *supra*.

The original bill used the language "obtained from the public" rather than "obtained from a person." S. REP. NO. 89-813, *supra* note 310, at 1-2. *Consumers Union of the United States v. Veterans Admn.*, 301 F. Supp. 796 (S.D.N.Y. 1969), suggested that this change was not intended to include agency personnel. But cf. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 34.

622. *Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171, 1174 (D.D.C. 1973) (board-developed unilateral orders determining excess profits not exempt); *Brockway v. Department of the Air Force*, 370 F. Supp. 738, 741 (N.D. Iowa 1974) (statements by agency officials who were witnesses to an airplane crash not exempt). Cf. *Consumers Union of United States, Inc. v. Veterans Admn.*, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1969) (data from hearing aid tests were not exempt because they were generated by the agency and were not confidential).

623. A corollary to this rule would be that if an agency receives information from sources outside the government, that information should be found to meet the "obtained from a person" requirement regardless of future transfers between agencies. Cf. Note, 74 COLUM. L. REV. 895, *supra* note 333, at 952.

624. See *id.* at 953.

625. S. REP. NO. 89-813, *supra* note 310, at 9; H.R. REP. NO. 89-1497, *supra* note 310, at 10; cf. K. DAVIS, *supra* note 265, § 3A.20, at 153-55 (Supp. 1970). Executive privilege may also be included under this language. See text at notes 262-307 *supra*. Any material covered by executive privilege presumably would also be protected by exemption one (national security), see text at notes 506-35 *supra*, or by exemption three (other statutes). See text at notes 568-610 *supra*.

mation traditionally protected by the doctor-patient privilege, for example, will not be commercial or financial in nature and hence will not be covered by exemption four. Furthermore, this information is protected under exemption six, which provides for the withholding of medical files.⁶²⁶ Information protected by the other privileges, such as the lawyer-client privilege⁶²⁷ or the lender-borrower privilege, would be exempted from disclosure under (b)(4) anyway because of its "confidential" nature. Not surprisingly, the meaning of "privileged" has not been litigated in the courts.⁶²⁸

In contrast, the meaning of the term "confidential" has been extensively litigated. Courts originally found material confidential if it was of the type "'which would customarily not be released to the public by the person from whom it was obtained.'" ⁶²⁹ This test, based on language in the Senate and House reports,⁶³⁰ had two major defects. First, it allowed for a subjective determination of confidentiality. At least one court suggested that the test could be met if the supplier of information claimed that it was confidential.⁶³¹ Applying a subjective test, however, would be contrary to both the legislative history of exemption four⁶³² and the full disclosure policy of the FOIA.⁶³³ Second, the test did not allow courts to consider

626. 5 U.S.C. § 552(b)(6) (1970). See text at notes 700-44 *infra*.

627. See generally K. DAVIS, *supra* note 265, § 3A.20, at 154 (Supp. 1970). Davis points out that "the government through its lawyers seldom serves private clients," *id.*, and seems to assume that the privilege can only apply to private client contact.

628. See, e.g., GSA v. Benson, 415 F.2d 878, 881 (9th Cir. 1969) (appraisal reports which might conceivably be "privileged" were only evaluated as confidential).

629. Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971), quoting S. REP. No. 89-813, *supra* note 310, at 9. See, e.g., Fisher v. Renegotiation Bd., 473 F.2d 109, 113 n.4 (D.C. Cir. 1972); Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298, 1307 (D.D.C. 1973), modified in part, 505 F.2d 350 (D.C. Cir. 1974); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 471 (D.D.C. 1973); cf. GSA v. Benson, 415 F.2d 878, 881-82 (9th Cir. 1969).

630. See S. REP. No. 89-813, *supra* note 310, at 9; H.R. REP. No. 89-1497, *supra* note 310, at 10.

631. See, e.g., Sterling Drug, Inc. v. FTC, 450 F.2d 698, 701, 709 (D.C. Cir. 1971). Cf. Benson v. GSA, 289 F. Supp. 590, 594 (W.D. Wash. 1968), *affd.*, 415 F.2d 878, 881 (9th Cir. 1969); ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 34. See generally Note, *supra* note 612, at 113-22.

Most courts, however, agree that the test was "objective." See, e.g., National Parks & Conservation Assn. v. Morton, 498 F.2d 765, 766 (D.C. Cir. 1974); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 471 (D.D.C. 1971).

632. The Senate report refers to material "which would customarily not be released to the public by the person from whom it was obtained." S. REP. No. 89-813, *supra* note 310, at 9 (emphasis added). The House report contains similar language. See H.R. REP. No. 89-1497, *supra* note 310, at 10. This language seems to indicate a more general test than whether a particular supplier objects to a particular release of information.

633. To further the Act's purpose of broad disclosure, "a bare claim of confidentiality" should not be sufficient. See Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970). Cf. Consumers Union of United States, Inc. v. Veterans Admn., 301 F. Supp. 796, 801 (S.D.N.Y. 1969), appeal dismissed, 436 F.2d

the substance of disputed information to determine if its release would be contrary to the purpose of the exemption. Unless the disclosure of certain information would violate one of the interests that exemption four seeks to protect, the information should not be found to fall within the scope of the exemption.⁶³⁴

Because it was dissatisfied with the above test, the Court of Appeals for the District of Columbia, in *National Parks & Conservation Association v. Morton*,⁶³⁵ established a new standard for defining "confidential" based on an analysis of the legislative purpose underlying the exemption. The court concluded that the exemption was created to protect the efficient operation of government⁶³⁶ and the interests of the people supplying information to the government⁶³⁷ and formulated the following test: "Commercial or financial matter is 'confidential' for purposes of [exemption four] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."⁶³⁸ Although, by incorporating the purposes of exemption four, this new test for confidentiality remedies one of the problems

1363 (2d Cir. 1971), where the court expressed fears that an agency would be able to render nonconfidential information exempt by transferring it to an agency that promised to keep it confidential. Although there is language in the House report to support the contention that such a promise is enough to find information confidential, see H.R. REP. NO. 89-1497, *supra* note 310, at 10, courts have rejected this argument because "[t]o allow a promise of confidentiality to control would enable the agency to render meaningless the statutory scheme." *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1307 (D.D.C. 1973), *modified in part*, 505 F.2d 350 (D.C. Cir. 1974). See *Petkas v. Staats*, 501 F.2d 887, 889 (D.C. Cir. 1974); *Ackerly v. Ley*, 420 F.2d 1336, 1339-40 (D.C. Cir. 1969); *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1003-04 (D.D.C. 1974); *Legal Aid Soc. v. Shultz*, 349 F. Supp. 771, 776 (N.D. Cal. 1972); *K. Davis*, *supra* note 265, § 3A.22, at 164 (Supp. 1970); Comment, *supra* note 333, at 266. Cf. *Robles v. EPA*, 484 F.2d 843, 846 (4th Cir. 1973) (applying a similar rule to exemption six cases). But see *Consumers Union of United States, Inc. v. Veterans Admn.*, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

634. But see text at notes 496-500 *supra*.

635. 498 F.2d 765 (D.C. Cir. 1974). For general discussions of this case see 88 HARV. L. REV. 470 (1974); Note, 1975 DUKE L.J. 416, *supra* note 333, at 422-44.

636. 498 F.2d at 767. Other governmental interests are also served by exemption four. For example, the exemption encourages people to give certain kinds of information to the government and thus enables the government to make informed decisions. *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974); *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971). It also furthers the government's interest in obtaining the best work possible from governmental contractors. If data from government contracts were routinely disclosed to the public, fewer companies might be willing to do government work, preferring to avoid exposure of their trade secrets and competitive positions. *Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171, 1175 (D.D.C. 1973).

637. 498 F.2d at 767.

638. 498 F.2d at 770.

of the old test,⁶³⁹ it leaves the other problem unsolved: subjective factors may still be used to determine whether a particular piece of information is confidential.

Information will be found to be confidential under the first alternative of the *National Parks* test if the government can show that disclosing the information would hinder its ability to obtain information necessary for its efficient operation.⁶⁴⁰ The courts have held that the government cannot make such a showing, and hence the first alternative cannot be satisfied, if there is a law requiring persons to relinquish the information in question to the government,⁶⁴¹ or if the government has at some point agreed to disclose the information.⁶⁴²

Subjective factors could enter into the determination of confidentiality under this first alternative in either of two ways. First, an information supplier's request for confidentiality may be viewed by the courts as evidence of an unwillingness to give information to the government without the assurance of confidentiality. Therefore, such requests may be used to find that the government's ability to obtain data will be impaired if the information in question is disclosed. Second, it is possible that agencies will be able to make an "impairment" showing, and thus satisfy this first alternative, by meeting the old test for confidentiality.⁶⁴³ The fact that information "would customarily not be released to the public" may be viewed as evidence that a person would be unwilling to give the information to the government if it would not be kept confidential. Thus, to the extent that subjective factors enter into the determination of what information "would customarily not be released,"⁶⁴⁴ they would also enter into the determination whether the government's ability to obtain information will be impaired.

639. See text at note 634 *supra*.

640. *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974): "Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired."

641. See *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 771 (D.C. Cir. 1974); *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 776-77 (D.D.C. 1974); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 296 (C.D. Cal. 1974).

642. See *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1005 (D.D.C. 1974); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292 (C.D. Cal. 1974).

643. The court in *National Parks* indicated that, while meeting the old confidentiality test might not be sufficient to exempt information under exemption four, *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), the old test might still be used in conjunction with the new test. 498 F.2d at 767. Later cases have also taken this position. See *Pacific Architects & Engrs., Inc. v. Renegotiation Bd.*, 505 F.2d 383, 384 (D.C. Cir. 1974); *Petkas v. Staats*, 501 F.2d 887, 889 (D.C. Cir. 1974); *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 79 (D.C. Cir. 1974); *Ditlow v. Shultz*, 379 F. Supp. 326 (D.D.C. 1974).

644. See text at note 629 *supra*.

In order to avoid the potential use of a subjective standard to determine whether information can be withheld under exemption four, it is suggested that courts not consider the government's interest in obtaining information in exemption four cases. If Congress determines that the government needs certain data, it can enact specific legislation requiring people to relinquish that information to the government, thus ensuring that the government's access to information will not be impaired if the material is disclosed to the public.⁶⁴⁵ If Congress does not deem information sufficiently necessary to the efficient operation of the government to warrant such a statute, then there is little reason for courts to be concerned if the government's ability to obtain this information is impaired. Because Congress is probably best able to determine the needs of government agencies and because Congress can easily protect those needs, it seems that the courts will better achieve the goals of the FOIA and exemption four by ignoring this interest and focusing instead on the second alternative definition of "confidential" suggested in *National Parks*.

"Confidentiality" will be found under this second alternative if substantial harm to the information supplier's competitive position will result from the information's disclosure. The characterization of the supplier's interest in terms of harm to its competitive position is appealing because it narrows the court's inquiry. Although it is possible to conclude from the legislative history of exemption four that the exemption was intended to extend to all information that businesses might customarily find confidential,⁶⁴⁶ the *National Parks* court was justified in resolving ambiguities as to congressional intent narrowly and concluding that only the supplier's competitive position should be protected, since the basic purpose of the Act is to encourage disclosure.⁶⁴⁷ There is nothing in the legislative history of the exemption that supports the conclusion that Congress intended to protect only "substantial" competitive harm, however, and the court failed to provide an explanation for this further narrowing of the exemption. This language is appropriate to the extent that it eliminates frivolous claims of competitive harm and requires the government or the supplier to prove specific harm, rather than relying on a general assertion of possible adverse competitive effects. The one drawback of requiring proof of "substantial competitive harm" is that it may result in protracted litigation. If the issues become too complex, a requester may be discouraged from seeking court review of an agency decision to withhold information. Thus, there is a

645. Cf. text at note 641 *supra*.

646. See S. REP. NO. 89-813, *supra* note 310, at 9; H.R. REP. NO. 89-1497, *supra* note 310, at 10.

647. See text at notes 308-12 *supra*.

danger that the second alternative of *National Parks* test may ultimately discourage disclosure.

Another problem with this second alternative is that by its terms it applies only to the person from whom the information was obtained. It is possible that the subject of the information will not be the same person as the supplier. No case has yet had to consider this issue. Although Congress does not seem to have thought of this possibility, it would seem that it intended to protect the competitive position of the subject of the information even if he is not the supplier.

Finally, if competitive harm would result from the disclosure of information, the courts and the agencies should consider the possibility of deleting identifying details so that the harm to the competitor will be eliminated and the remaining material can be disclosed.

Despite its failings, the *National Parks* test is a major advance toward improving determinations whether information should be released to the public. The most important contribution of this test is its use of interest analysis. It is imperative that this aspect of the test be retained by the courts.

e. *Inter-agency or intra-agency memoranda.* The fifth FOIA exemption protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."⁶⁴⁸ The language of exemption five is broad enough to encompass all government writings.⁶⁴⁹ The

648. 5 U.S.C. § 552(b)(5) (1970).

649. See Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047, 1048-49 (1973). The House and Senate reports indicated that some limitation on the exemption was necessary to avoid "indiscriminate administrative secrecy." S. REP. NO. 89-813, *supra* note 310, at 9. The Senate report states:

It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.

Id.

The House report comments:

Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S. 1160 exempts from disclosure material "which would not be available by law to a private party in litigation with the agency." Thus, any internal memorandums which would routinely

legislative history of the exemption indicates that it was enacted to preserve the "efficiency of Government" operations⁶⁵⁰ by protecting the "full and frank exchange of opinions"⁶⁵¹ within and between agencies and by preventing premature disclosure of documents.⁶⁵² The courts have narrowly construed the language of this exemption by developing criteria for its application that are consistent with the exemption's purpose.⁶⁵³

If the words "memorandums or letters" were interpreted literally, exemption five would be, in some respects, too narrow. This language appears to exclude documented communications that are not in writing, such as tapes or computer-stored data.⁶⁵⁴ Although no court has considered this issue, it is likely that the form of a communication will not be considered determinative. Instead, the courts will look at the substance of the communication to determine whether it should be disclosed in light of the interests sought to be protected by exemption five.⁶⁵⁵

The scope of the words "inter-agency or intra-agency" is also unclear.⁶⁵⁶ The Supreme Court has emphasized that both kinds of memoranda may be exempt.⁶⁵⁷ If a document is of the kind "which

be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public. H.R. REP. NO. 89-1497, *supra* note 310, at 10. See generally Katz, *supra* note 333, at 1272-77 (1970); Koch, *supra* note 333, at 210-15 (1972); Note, 74 COLUM. L. REV. 895, *supra* note 333, at 936-43; Note, 86 HARV. L. REV. 1047, *supra*; Comment, *The Freedom of Information Act and Its Internal Memoranda Exemption: Time for a Practical Approach*, 27 SW. L.J. 806 (1973).

650. S. REP. NO. 89-813, *supra* note 310, at 9.

651. H.R. REP. NO. 89-1497, *supra* note 310, at 10. See S. REP. NO. 89-813, *supra* note 310, at 9.

652. H.R. REP. NO. 89-1497, *supra* note 310, at 10. See ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 35, in which the Attorney General argued for the protection of "documents where premature disclosure would harm the authorized and appropriate purpose for which they are being used." See also S. REP. NO. 89-813, *supra* note 310, at 9.

653. See, e.g., NLRB v. Sears, Roebuck & Co., 43 U.S.L.W. 4491, 4496-97 (U.S. April 28, 1975); EPA v. Mink, 410 U.S. 73, 85 (1973).

654. The Senate report refers only to "writings." S. REP. NO. 89-813, *supra* note 310, at 9.

655. Cf. Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). The exemption "does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum." 424 F.2d at 939.

656. This language could be interpreted to exclude communications from Congress, state or local governments. Koch, *supra* note 333, at 214 n.96. Professor Davis concluded that, although Congress did not intend to exclude congressional-agency communications from the operation of exemption five, such an exclusion would be beneficial. K. DAVIS, *supra* note 265, § 3A.21, at 156 (Supp. 1970). But cf. Exxon Corp. v. FTC, 384 F. Supp. 755, 763 (D.D.C. 1974), where the court examined congressional communications to an agency in terms of exemption seven as part of an "informant's privilege."

657. Renegotiation Bd. v. Grumman Aircraft Engr. Corp., 43 U.S.L.W. 4502, 4508 (U.S. April 28, 1975).

would not be available by law to a party . . . in litigation with the agency"⁶⁵⁸ and if the purposes of exemption five would best be served by withholding the document, it should be exempt whether it is used exclusively within an agency or given to another agency. Courts have interpreted "inter-agency or intra-agency" memoranda to include memoranda of outside consultants who are temporarily performing the roles of agency officials or employees.⁶⁵⁹ Because the consultants' communications are similar to agency memoranda in these situations, the same policy reasons for protecting against disclosure apply.⁶⁶⁰ Courts should not interpret exemption five to apply to the communications of all agency consultants, however. There is a difference between consultants whose recommendations are integrated into the agency deliberative process, where free discussion of ideas is thought to be essential, and interested parties who are trying to influence agency decisions. Communications of this latter group should not be beyond public scrutiny.⁶⁶¹

By far the most difficult language to interpret in this exemption is the modifying clause, "which would not be available by law to a party other than an agency in litigation with the agency." Congress chose to limit this exemption through application of discovery principles because of the similarity between the purposes of the discovery defense of "governmental privilege" and the purposes of exemption five.⁶⁶² It is clear, however, that discovery principles are to be applied

658. 5 U.S.C. § 552(b)(5) (1970).

659. *E.g.*, *Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 246 (D.D. Cir. 1974), *cert. denied*, 43 U.S.L.W. 3601 (U.S. May 12, 1975); *Wu v. National Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971).

660. *See, e.g.*, *Wu v. National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973). The reports at issue in *Wu* had been prepared by experts in Chinese history to help the Endowment evaluate Professor Wu's request for a grant. Since the Endowment could not possibly maintain a large staff of experts on all subjects, these outside experts were temporarily performing the functions of agency personnel. *See* text at note 661 *infra*.

661. *See* Note, 86 HARV. L. REV., *supra* note 649, at 1064-66. The author of that Note also argues that exemption five should not be extended to cover the communications of outside consultants who may be biased. Extending the protection of exemption five to these communications would, for example, encourage secrecy between agency-regulated companies and the government.

662. *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4496 (U.S. April 28, 1975); *EPA v. Mink*, 410 U.S. 73, 85-89 (1973). A leading discovery case stated that the policy behind the governmental privilege seeks to promote "open, frank discussion between subordinate and chief concerning administrative action." *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958). *See* *Freeman v. Seligson*, 405 F.2d 1326, 1339 (D.C. Cir. 1968); H.R. REP. NO. 89-1497, *supra* note 310, at 10; ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 36. The exemption also protects "the attorney-client and attorney work product privileges generally available to all litigants." *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4496-97 (U.S. April 28, 1975). The scope of this protection is uncertain, but it seems to be an application of the exemption's protection of pre-decisional and recommendatory materials. *See* text at

in exemption five cases "by way of rough analogies,"⁶⁶³ with the emphasis on furthering the purposes of the FOIA and the exemption.

In formulating a standard to restrict the potential breadth of exemption five, most courts have relied upon the established discovery practice of releasing factual material to private parties who are in litigation with the government.⁶⁶⁴ These courts thus order the disclosure of factual materials, but permit the withholding of materials that reflect the "deliberative or policy-making processes"⁶⁶⁵ of agencies.⁶⁶⁶ The Supreme Court endorsed this standard in *EPA v.*

notes 673-89 *infra*. The protection of "privileged" material is discussed in conjunction with exemption four. See text at notes 625-28 *supra*.

663. *EPA v. Mink*, 410 U.S. 73, 86 (1973). Some courts have interpreted the exemption to require a literal application of the discovery provisions in the Federal Rules of Civil Procedure (Fed. R. Civ. P. 26-37). For instance, the Ninth Circuit found that "Federal Rule of Civil Procedure 26(b) is sufficiently broad to entitle discovery of the records in question, and ordered disclosure of the records under the FOIA." *GSA v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969). See, e.g., *International Paper Co. v. FPC*, 438 F.2d 1349, 1358-59 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971); *Anchorage Bldg. Trades Council v. HUD*, 384 F. Supp. 1236, 1240 (D. Alas. 1974); *EEOC v. Los Alamos Constrs., Inc.*, 382 F. Supp. 1373, 1379 (D.N.M. 1974); *Long v. IRS*, 349 F. Supp. 871, 873-75 (W.D. Wash. 1972); *Brockway v. Department of the Air Force*, 370 F. Supp. 738, 739-41 (N.D. Iowa 1974).

Because different purposes are served by the civil procedure rules and exemption five, and because the rules have their own requirements, this interpretation is unsatisfactory. For example, different discovery rules apply depending on whether the party from whom the information is sought is a prosecutor, a civil plaintiff, or a defendant. *EPA v. Mink*, 410 U.S. 73, 86 n.13 (1973). Exemption five does not explain how the government is to be treated. 410 U.S. at 86. In addition, the exemption is phrased in terms of "a party." This indicates that the question is not whether the information would be released in discovery proceedings to this particular applicant, but rather whether it is of a type that would be routinely released to any party. *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4496 n.16 (U.S. April 28, 1975); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 705 (D.C. Cir. 1971); *Anchorage Bldg. Trade Council v. HUD*, 384 F. Supp. 1236, 1240 (D. Alas. 1974) (dictum); Note, 74 COLUM. L. REV. 895, *supra* note 333, at 942-43; H.R. REP. NO. 89-1497, *supra* note 310, at 10; K. DAVIS, *supra* note 265, § 3A.21, at 158 (Supp. 1970). But cf. *Weisberg v. Department of Justice*, 489 F.2d 1195, 1203 n.15 (D.C. Cir. 1973). Moreover, a person requesting discovery must show that the information sought is "relevant to the subject matter involved in the pending action . . ." Fed. R. Civ. P. 26(b). See also Comment, *supra* note 649, at 812. The FOIA, on the other hand, provides that records are to be disclosed to "any person." 5 U.S.C. § 552(a)(3) (1970), as amended, 5 U.S.C.A. § 552(a)(3) (Supp. Feb. 1975). See text at note 458 *supra*. Many of the courts that applied the discovery rules literally to exemption five claims have considered the need of the person requesting the information. See, e.g., *International Paper Co. v. FPC*, 438 F.2d 1349, 1358-59 (2d Cir. 1971). The relationship between discovery and the FOIA in general is discussed in the text at notes 1098-104 *infra*.

664. See *EPA v. Mink*, 410 U.S. 73, 87-88 (1973).

665. *EPA v. Mink*, 410 U.S. 73, 89 (1973).

666. Under this rule the following materials have been considered "factual": parts of a report on the development of the SST (*Soucie v. David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971)), parts of an Air Force report on a plane crash (*Brockway v. Department of the Air Force*, 370 F. Supp. 738, 741-42 (N.D. Iowa 1974)), the raw scores and scoring scheme from VA tests on hearing aids (*Consumers Union of United States*,

Mink,⁶⁶⁷ by pointing to the legislative history of exemption five, which specifically refers to the factual-deliberative distinction.⁶⁶⁸ Because fine distinctions between fact and policy must be made under this standard, it has been important for the courts to know the exact contents of the disputed material. Thus, in camera inspection of material is a frequently used technique in exemption five cases.⁶⁶⁹ In order to release the maximum amount of information, the courts have isolated the factual material contained in a document unless that material was "inextricably intertwined"⁶⁷⁰ with deliberative

Inc. v. Veterans Admn., 301 F. Supp. 796, 805-06 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971)), "medical and scientific data" used by the Administrator of the EPA (*Ethyl Corp. v. EPA*, 478 F.2d 47 (4th Cir. 1973)), FBI memoranda recounting brief contacts "for purely informational purposes" with a Congressman (*Koch v. Department of Justice*, 376 F. Supp. 313, 317 (D.D.C. 1974)), an IRS manual and statistical report (*Long v. IRS*, 349 F. Supp. 871, 873-74 (W.D. Wash. 1972)), and an FHA appraisal report (*Tennessee Newspapers, Inc. v. FHA*, 464 F.2d 657, 660 (6th Cir. 1972)).

Materials declared "deliberative," and thus protected by exemption five, include an Army report on Mylai (*Aspin v. Department of Defense*, 348 F. Supp. 1081, 1082 (D.D.C. 1972), *aff'd.*, 491 F.2d 24 (D.C. Cir. 1973)), staff memoranda on cases that had been heard by the FPC (*International Paper Co. v. FPC*, 438 F.2d 1348, 1358-59 (2d Cir. 1971)), an evaluation of a research grant application (*Wu v. National Endowment for Humanities*, 460 F.2d 1030, 1034 (5th Cir. 1972)), a report containing recommendations for revision of federal automotive safety standards (*Ditlow v. Volpe*, 362 F. Supp. 1321, 1327 (D.C. Cir. 1973), *rev'd. on other grounds sub nom.* *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974), *cert. denied*, 43 U.S.L.W. 3256 (U.S. Oct. 29, 1974)), legal advice and staff recommendations to the AEC concerning a proposed nuclear reactor (*Porter County Chapter of the Izaak Walton League of America, Inc. v. AEC*, 380 F. Supp. 630 (N.D. Ind. 1974)), and some parts of an Air Force crash report (*Brockway v. Department of the Air Force*, 370 F. Supp. 738, 742 (N.D. Iowa 1974)).

667. 410 U.S. 73 (1973).

668. 410 U.S. at 89-90.

669. *See, e.g.*, *National Cable Television Assn., Inc. v. FCC*, 479 F.2d 183 (D.C. Cir. 1973); *Fisher v. Renegotiation Bd.*, 473 F.2d 109, 114 (D.C. Cir. 1972); *Soucie v. David*, 448 F.2d 1067, 1079 (D.C. Cir. 1971); *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969); *Exxon Corp. v. FTC*, 384 F. Supp. 755, 764 (D.D.C. 1974); *Rabbitt v. Department of the Air Force*, 383 F. Supp. 1065, 1068 (D.D.C. 1974); *Porter County Chapter of the Izaak Walton League of America, Inc. v. AEC*, 380 F. Supp. 630 (N.D. Ind. 1974); *Koch v. Department of Justice*, 376 F. Supp. 313 (D.D.C. 1974); *Kreindler v. Department of the Navy*, 363 F. Supp. 611 (S.D.N.Y. 1973); *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1309 (D.D.C. 1973), *modified in part*, 505 F.2d 350 (D.C. Cir. 1974); *Wellford v. Hardin*, 315 F. Supp. 175 (D. Md. 1970), *aff'd.*, 444 F.2d 21 (4th Cir. 1971). *See also* Comment, *In Camera Inspection Under the Freedom of Information Act*, 41 U. CHI. L. REV. 557, 575-79 (1974). The 1974 amendments to the FOIA have explicitly authorized the use of in camera inspection. 5 U.S.C.A. § 552(a)(4)(b) (Supp. Feb. 1975). Since the policy of protecting governmental confidentiality is somewhat impaired by an in camera inspection, the Supreme Court has cautioned against excessive use of such inspections: "Plainly, in some situations, *in camera* inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency." *EPA v. Mink*, 410 U.S. 73, 93 (1973). *See* text at notes 965-88 *infra*.

670. *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

material.⁶⁷¹ The 1974 amendments to the FOIA codified this practice.⁶⁷²

The problem with the factual-deliberative standard is that it sometimes results in an unnecessary withholding of information. Some courts have tried to design a standard that would allow the disclosure of more material without violating the purposes of exemption five.

The Supreme Court has recently taken a new approach in exemption five cases by distinguishing "between predecisional memoranda prepared in order to assist an agency decision-maker in arriving at his decision, which are exempt from disclosure, and post-decisional memoranda setting forth the reasons for an agency decision already made, which are not."⁶⁷³ In *NLRB v. Sears, Roebuck & Co.*,⁶⁷⁴ the Court held that memoranda prepared by the General Counsel of the NLRB explaining his decision not to file complaints constituted "final opinions" and were not protected by exemption five.⁶⁷⁵ In *Renegotiation Board v. Grumman Aircraft Engineering Corp.*,⁶⁷⁶ the Court allowed the withholding of regional renegotiation board reports since these reports were merely recommendations, subject to further consideration by the National Renegotiation Board.⁶⁷⁷

The opinions in these two cases illustrate the relationship between exemption five and the FOIA's requirement that "final opinions"⁶⁷⁸ and "statements of policy"⁶⁷⁹ be made available for

671. See, e.g., *Ethyl Corp. v. EPA*, 478 F.2d 47, 50 (4th Cir. 1973). The Supreme Court has approved the disclosure "of purely factual material appearing in . . . documents in a form that is severable without compromising the private remainder of the documents." *EPA v. Mink*, 410 U.S. 73, 91 (1973). See *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

In *Koch v. Department of Justice*, 376 F. Supp. 313 (D.C. Cir. 1974), the court found factual material to be "inextricably intertwined with the policy-making process" in memoranda that contained no specific recommendations. "Virtually all of the factual material" was already known by the plaintiffs, so that disclosure would reveal only "which facts were deemed significant by the [FBI]," thus illuminating the policy-making and deliberative processes of the Bureau. 376 F. Supp. at 317. See also *Exxon Corp. v. FTC*, 384 F. Supp. 755, 764 (D.D.C. 1974) (denying disclosure of factual material not severable from opinion).

672. 5 U.S.C.A. § 552(b) (Supp. Feb. 1975). See text at notes 501-05 *supra*; CONFERENCE REPORT, *supra* note 225, at 13; S. REP. No. 93-854, *supra* note 329, at 31-32.

673. *Renegotiation Bd. v. Grumman Aircraft Engr. Corp.*, 43 U.S.L.W. 4502, 4507 (U.S. April 28, 1975). See *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4497 (U.S. April 28, 1975), and cases cited therein.

674. 43 U.S.L.W. 4491 (U.S. April 28, 1975).

675. 43 U.S.L.W. at 4496. These memoranda represented final dispositions since each was "an unreviewable rejection of the charge filed by the private party." 43 U.S.L.W. at 4498. Memoranda that directed the agency to file complaints, on the other hand, were held to be covered by the exemption's protection of an attorney's work privilege. 43 U.S.L.W. at 4500.

676. 43 U.S.L.W. 4502 (U.S. April 28, 1975).

677. 43 U.S.L.W. at 4507.

678. 5 U.S.C. § 552(a)(2)(A) (1970). See text at notes 394-405 *supra*.

679. 5 U.S.C. § 552(a)(2)(B) (1970). See text at notes 406-17 *supra*.

public inspection. The first case to make a distinction between pre- and post-decisional memoranda was *American Mail Line, Ltd. v. Gulick*.⁶⁸⁰ That case involved a memorandum that was cited and quoted in a decision by the Maritime Subsidy Board. The court held that because it explicitly and publicly incorporated the memorandum, the agency could not withhold it on the basis of exemption five. It had become part of the final agency opinion.⁶⁸¹ Subsequent opinions have recognized that memoranda that reflect policy already made should be released either as final opinions or as records not exempt under (b)(5).⁶⁸² In *Sears and Grumman*, the Supreme Court made it clear that exemption five can never apply to "final opinions" and "final dispositions" of matters by an agency.⁶⁸³ It is important to note, however, that there may well be documents that are not "final opinions," which do not fall under the protection of exemption five.⁶⁸⁴ These documents should of course be released.⁶⁸⁵

The most important contribution of *Sears and Grumman* to the interpretation of exemption five may be the approach the Court used to decide the issues before it. In both cases, the Court conducted a very careful investigation into the contents and use of the requested documents⁶⁸⁶ and analyzed the reasons and purposes behind the exemption.⁶⁸⁷ The Court explicitly recognized that the

680. 411 F.2d 696 (D.C. Cir. 1969).

681. "If the Maritime Subsidy Board did not want to expose its staff's memorandum to public scrutiny it should not have stated publicly in its April 11 ruling that its action was based upon that memorandum, giving no other reasons or basis for its action. When it chose this course of action . . . the memorandum lost its intra-agency status and became a public record . . ." 411 F.2d at 703.

682. See, e.g., *Ash Grove Cement Co. v. FTC*, 511 F.2d 815, 818 & n.12 (D.C. Cir. 1975); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971); *Vaughn v. Rosen*, 383 F. Supp. 1049, 1053-54 (D.D.C. 1974); *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1302 (D.D.C. 1973), modified in part on other grounds, 505 F.2d 350 (D.C. Cir. 1974) (IRS letter rulings held to be "interpretations adopted by the agency"). But cf. *Fisher v. Renegotiation Bd.*, 473 F.2d 109, 115 (D.C. Cir. 1972) (policy recommendations lose their protected status only in "special circumstances" such as those present in *Gulick*). See also Note, 74 COLUM. L. REV. 895, *supra* note 333, at 938-41; Comment, 1974 DUKE L.J. 251, *supra* note 333, at 272-74; Note, 86 HARV. L. REV. 1047, *supra* note 649, at 1057-63; Comment, *supra* note 649, at 816-20; Note, 8 U. MICH. J. L. REF. 329, *supra* note 333, at 335, 344-46 (1975).

683. *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4498 (U.S. April 28, 1975); *Renegotiation Bd. v. Grumman Aircraft Engr. Corp.*, 43 U.S.L.W. 4502, 4507 n.21 (U.S. April 28, 1975).

684. Cf. *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4498 n.21 (U.S. April 28, 1975).

685. Compare text at notes 691-95 & 1098-104 *infra*.

686. *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4493-94 (U.S. April 28, 1975); *Renegotiation Bd. v. Grumman Aircraft Engr. Corp.*, 43 U.S.L.W. 4502, 4503-05 (U.S. April 28, 1975).

687. *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4496-500 (U.S. April 28, 1975); *Renegotiation Bd. v. Grumman Aircraft Engr. Corp.*, 43 U.S.L.W. 4502, 4507-09 (U.S. April 28, 1975). Although the Supreme Court in *Grumman* reversed the decision of the Court of Appeals, 482 F.2d 710 (D.C. Cir. 1973), the Court did not take issue

free exchange of ideas within an agency would not be impaired by the release of "communications with respect to the decision occurring after the decision is finally reached"⁶⁸⁸ and stated that "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency, constitute the 'working law' of the agency"⁶⁸⁹

It is important in deciding FOIA questions in general, and exemption five questions in particular, for courts to base decisions on the purposes of the legislation, rather than to apply rules mechanically. Indeed, the pre- and post-decisional standard used by the Supreme Court in these cases could be broadened to include documents that indicate the basis of an agency decision, whether or not they reflect agency policy deliberations, without compromising the purposes of exemption five. No court has accepted a "basis of decision" standard, however.⁶⁹⁰

In *Montrose Chemical Corp. v. Train*,⁶⁹¹ the court held that a summary of evidence presented at public hearings was protected from disclosure by exemption five.⁶⁹² The summary was prepared by EPA staff members to assist the Administrator of the EPA in deciding whether to ban DDT. The court reasoned that one of the exemption's purposes was "to protect not simply deliberative material, but also the deliberative process of agencies,"⁶⁹³ and that "[t]o probe the summaries of record evidence would be the same as

with the lower court's distinction between decisional and pre-decisional documents nor with that court's analysis of the policies behind the exemption.

688. *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4497 (U.S. April 28, 1975). Compare 43 U.S.L.W. at 4500 ("The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if adopted, will become public is slight") (emphasis original), with *Renegotiation Bd. v. Grumman Aircraft Engr. Corp.*, 43 U.S.L.W. 4502, 4507 (April 28, 1975) ("The . . . [r]eports are thus precisely the kind of prediscisional deliberative advice . . . which must remain uninhibited and thus undisclosed, in order to supply maximum assistance to the Board in reaching its decision").

689. *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4497 (U.S. April 28, 1975). See 43 U.S.L.W. at 4498; *Renegotiation Bd. v. Grumman Aircraft Engr. Corp.*, 43 U.S.L.W. 4502, 4507 (U.S. April 28, 1975) ("absent indication that its reasoning has been adopted, there is little public interest in disclosure of a Report. . . . Indeed, release of the Regional Board's reports on the theory that they express the reasons for the Board's decision would, in those cases in which the Board had other reasons for its decision, be affirmatively misleading").

690. But cf. *Pacific Architects & Engrs., Inc. v. Renegotiation Bd.*, 505 F.2d 383, 386 (D.C. Cir. 1974), where the court, remanding for evidence on whether a document was the sole basis for an agency decision, said, "We do not mean to intimate that a finding that the [material requested] is the sole basis for decision requires disclosure *pro tanto* but only that a contrary finding greatly strengthens the Board's case for non-disclosure." See also *Washington Research, Inc. v. HEW*, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 43 U.S.L.W. 3601 (U.S. May 12, 1975).

691. 491 F.2d 63 (D.C. Cir. 1974).

692. 491 F.2d at 67-68.

693. 491 F.2d at 71.

probing the decision-making process itself.”⁶⁹⁴ The factual summary at issue in this case did not reflect agency policy, but it did indicate the basis for the agency’s decision. If such factual summaries are released, the public and the courts will be better able to evaluate agency decisions.

Providing the public with a means of scrutinizing agency actions and procedures is the basic purpose of the FOIA; there is no reason to sacrifice the benefits to be gained from disclosure in an instance where releasing information would not violate the purposes of exemption five. Since, by hypothesis, an agency will no longer be in the process of making a decision, disclosing information concerning the basis for an agency decision will not involve the premature disclosure of ideas. And agency personnel are not likely to hesitate to exchange ideas because those ideas may be disclosed to the public if adopted. The satisfaction of having one’s own recommendations accepted will usually override any fears of public disclosure.⁶⁹⁵ Moreover, in a case in which a court is convinced that disclosing information would render persons more hesitant to give frank opinions in the future,⁶⁹⁶ an effort could be made to delete identifying details from the disputed materials.⁶⁹⁷ If such deletion would not protect the individual staff member or consultant, then the information should be withheld to ensure that agencies are able to maintain the free exchange of ideas necessary for efficient government and to protect the individuals from personal attack.

The proposed “basis standard” will best accomplish the FOIA goal of maximum possible disclosure. There is substantial value in disclosing agency policies because without such disclosure agencies

694. 491 F.2d at 68. Moreover, the court felt that, since all of the facts were in the public record of the hearings, all that would be revealed by disclosure of the summary would be the “evaluation and selection of certain facts.” 491 F.2d at 70.

695. See *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4500 (U.S. April 28, 1975), quoted in note 688 *supra*; Note, 86 HARV. L. REV. 1047, *supra* note 649, at 1060-61; Comment, *supra* note 649, at 834.

696. An example of one case in which this was true is *Wu v. National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973). The Endowment used outside consultants in evaluating the merits of a research grant application submitted by Professor Wu. On the basis of recommendations by these consultants, the Endowment denied Wu research funds, 460 F.2d at 1031, and Wu brought suit under the FOIA to obtain the recommendations. The Endowment argued that they would lose the valuable services of these outside consultants if an applicant was able to identify them: “[I]t is vital for the Endowment that their recommendations not be available to applicants; only then can reviewers be free to state their true opinion of an application without regard to the feelings of the applicant.” 460 F.2d at 1032 (quoting the affidavit of an Endowment official). The court agreed with the Endowment and refused to order disclosure of the consultants’ reports because “advice, recommendations, opinions, and other subjective material are protected.” 460 F.2d at 1032. Wu’s subsequent attempt to sue the unknown consultants for libel, see *Wu v. Keeney*, 384 F. Supp. 1161 (D.D.C. 1974), evidences the wisdom of the Fifth Circuit’s decision.

697. See text at notes 501-05 *supra*.

will be beyond the review of the courts, the Congress, and the public and will be able to develop a body of "secret law."⁶⁹⁸ Although the courts could adopt this test without waiting for congressional action, the confused case law indicates a need for statutory amendment. The cryptic modifying clause relating to discovery provides little aid to the courts for interpreting exemption five. Because of "the inevitable temptation of a governmental litigant to give [this exemption] an expansive interpretation in relation to the particular records in issue"⁶⁹⁹ and the FOIA's emphasis on disclosure, this exemption should be both written and construed narrowly.

f. *Personnel and medical files.* Exemption six provides for the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁷⁰⁰ This exemption attempts to protect effec-

698. One of the important goals of the FOIA was to prevent the application of "secret law" to unknowing citizens. *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4498 (U.S. April 28 1975); Note, 86 HARV. L. REV. 1047, *supra* note 649, at 1058; Comment, *supra* note 649, at 816. See S. REP. No. 89-813, *supra* note 310, at 7; H.R. REP. No. 89-1497, *supra* note 310, at 7; *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971); K. DAVIS, *supra* note 265, §§ 3A.11, 3A.21 (Supp. 1970).

699. *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969).

700. 5 U.S.C. § 552(b)(6) (1970). The Senate report explained this exemption as follows:

Such agencies as the Veterans Administration, Department of Health, Education, and Welfare, Selective Service, etc., have great quantities of files, the confidentiality of which has been maintained by agency rule but without statutory authority. There is a consensus that these files should not be opened to the public, and the committee decided upon a general exemption rather than a number of specific statutory authorizations for various agencies. It is believed that the scope of the exemption is held within bounds by the use of the limitation of a "clearly unwarranted invasion of personal privacy."

The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public.

S. REP. No. 89-813, *supra* note 310, at 9. See H.R. REP. No. 89-1497, *supra* note 310, at 11: "The exemption is . . . intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records." (footnote omitted); ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 36-37; K. DAVIS, *supra* note 265, § 3A.22, at 162-64 (Supp. 1970); Note, 74 COLUM. L. REV. 895, *supra* note 333, at 953-56; Note, *Invasion of Privacy and the Freedom of Information Act: Getman v. NLRB*, 40 GEO. WASH. L. REV. 527 (1972); 6 U. TOLEDO L. REV. 215 (1974).

There has been surprisingly little litigation involving exemption six. Three cases have concluded that the exemption doesn't apply: *Robles v. EPA*, 484 F.2d 843 (4th Cir. 1973); *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Rabbitt v. Department of the Air Force*, 383 F. Supp. 1065 (S.D.N.Y. 1974) (required disclosure in part). Four cases have denied disclosure pursuant to the exemption: *Vaughn v. Rosen*, 383 F. Supp. 1049 (D.D.C. 1974); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974); *Tuchinsky v. Selective Serv. Sys.*, 418 F.2d 155 (7th Cir. 1969); *Ditlow v. Shultz*,

tively an individual's right to privacy⁷⁰¹ within a statutory scheme that encourages disclosure.⁷⁰²

The scope of the protection provided by exemption six will depend upon the resolution of three basic ambiguities in its language. First, it is unclear what kinds of materials should be considered "personnel and medical files and similar files." The committee reports indicate that Congress intended all types of confidential information about citizens to be protected by the exemption.⁷⁰³ Accordingly, the word "files" should not be limited to an "orderly collection of papers,"⁷⁰⁴ but should include any documented personal

379 F. Supp. 326 (D.D.C. 1974). Three exemption six cases have been remanded to the district court for further consideration: *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974); *Rose v. Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3451 (U.S. Feb. 18, 1975) (No. 74-489); *Ackerly v. Ley*, 420 F.2d 1336 (D.C. Cir. 1969).

701. Recent legislation, e.g., Privacy Act of 1974, 5 U.S.C.A. § 552a (Supp. Feb. 1975), and judicial decisions, e.g., *Roe v. Wade*, 410 U.S. 113, 152-53 (1973), evidence society's concern for the protection of privacy. Unfortunately, there are no clear guidelines for defining the scope of this interest. The extent of the constitutional right to privacy is as yet unsettled. See text at notes 1789-915 *infra*. The common-law right to privacy, as defined by contemporary views within the community, see text at notes 1579-92 *infra*, does provide the agencies and the courts with some standards to evaluate the seriousness of an alleged invasion of privacy. See, e.g., *Rose v. Department of the Air Force*, 495 F.2d 261, 267 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3451 (U.S. Feb. 18, 1975) (No. 74-489), an FOIA case where the court used *Prosser on Torts* to determine what constituted an invasion of privacy. See Note, 40 GEO. WASH. L. REV. 527, *supra* note 700, at 539. As is argued in the text at notes 1601-25 *infra*, however, the tort standard for invasion of privacy may not be sufficient to protect citizens from government disclosure.

702. Deleting identifying details has been used by at least one court as a means of disclosing information without invading individual privacy. See *Rose v. Department of the Air Force*, 495 F.2d 261, 268 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3451 (U.S. Feb. 18, 1975) (No. 74-489) ("We think it highly likely that the combined skills of court and Agency, applied to the summaries, will yield edited documents sufficient for the purpose sought and sufficient as well to safeguard affected persons in their legitimate claims of privacy" (footnotes omitted)).

Support for deleting identifying details can be found in the language of H.R. REP. NO. 89-1497, *supra* note 310, at 11: "The exemption is also intended to cover detailed Government records on an individual *which can be identified as applying to that individual* . . ." (emphasis added). Deletion of details is mandated by section 552 (a)(2). See text at notes 449-56 *supra*.

The courts have generally not found in camera inspection to be necessary in exemption six cases, since the general content of the requested information is usually clear, and more detailed inspection is not necessary to determine the effect of any disclosure. See Comment, *supra* note 669, at 571-72 & n.105. It is not necessary, for instance, for a court to read a list of names and addresses in order to decide whether its release would be an invasion of privacy. But see *Rabbitt v. Department of the Air Force*, 383 F. Supp. 1065, 1070 (S.D.N.Y. 1974) (in camera inspection of medical files required).

703. S. REP. NO. 89-813, *supra* note 310, at 9; H.R. REP. NO. 89-1497, *supra* note 310, at 11. See note 700 *supra*.

704. WEBSTER'S NEW INTERNATIONAL DICTIONARY 945 (2d ed. 1960). "File" is defined as "a collection of cards or papers usu. arranged or classified" in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 849 (1971).

information that the government may have in its possession.⁷⁰⁵ The phrase "similar files" should cover any material having "the same characteristics of confidentiality that ordinarily attach to information in medical or personnel files; that is, to such extent as they contain 'intimate details' of a 'highly personal nature,' they [should be] within the umbrella of the exemption."⁷⁰⁶ Using this interpretation, the courts have considered disparate kinds of records, such as lists of names and addresses,⁷⁰⁷ Air Force Academy disciplinary files,⁷⁰⁸ information on housing discrimination,⁷⁰⁹ EPA reports on radioactivity,⁷¹⁰ and filled-out customs declaration forms,⁷¹¹ to be "similar files."⁷¹²

Second, it is possible to construe the language of exemption six to protect personnel and medical files whether or not their disclosure would be a "clearly unwarranted invasion of personal privacy." With little guidance from the committee reports, the courts have assumed that they must consider the seriousness of the invasion of privacy in all exemption six cases.⁷¹³

Finally, courts have had difficulty interpreting the phrase "clearly unwarranted invasion of privacy." Some courts have found that the "clearly unwarranted" language requires application of a balancing approach.⁷¹⁴ Other courts have found the language to require only an investigation into the seriousness of the privacy invasion.⁷¹⁵

705. See *Robles v. EPA*, 484 F.2d 843, 845 (4th Cir. 1973); *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974). Amendments to change this wording have been proposed but never passed. See H.R. 5425, 93d Cong., 1st Sess. (1973); H.R. REP. NO. 92-1419, *supra* note 327, at 84. One court has used this wording to deny the applicability of the exemption: "[T]he scope of subsection 6 which relates solely to 'files' cannot be stretched to cover witnesses' statements." *Rabbitt v. Department of the Air Force*, 383 F. Supp. 1065, 1069 (S.D.N.Y. 1974).

706. *Robles v. EPA*, 484 F.2d 843, 845 (4th Cir. 1973), *quoting* S. REP. NO. 89-813, *supra* note 310, at 9; H.R. REP. NO. 89-1497, *supra* note 310, at 11.

707. See *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974); *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Tuchinsky v. Selective Serv. Sys.*, 418 F.2d 155 (7th Cir. 1969).

708. See *Rose v. Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3451 (U.S. Feb. 18, 1975) (No. 74-489).

709. See *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974).

710. See *Robles v. EPA*, 484 F.2d 843 (4th Cir. 1973).

711. See *Ditlow v. Shultz*, 379 F. Supp. 326, 329 (D.D.C. 1974).

712. Most exemption six cases have involved "similar files." Medical files were at issue in *Rabbitt v. Department of the Air Force*, 383 F. Supp. 1065 (S.D.N.Y. 1974), and personnel files (Civil Service Commission reports and evaluations) in *Vaughn v. Rosen*, 383 F. Supp. 1049, 1051 (D.D.C. 1974).

713. See *Vaughn v. Rosen*, 383 F. Supp. 1049, 1054-55 (D.D.C. 1974) (personnel files); *Rabbitt v. Department of the Air Force*, 383 F. Supp. 1065, 1070 (S.D.N.Y. 1974) (medical files). See also *Robles v. EPA*, 484 F.2d 843, 846 (4th Cir. 1973); Note, 74 COLUM. L. REV. 895, *supra* note 333, at 953.

714. See *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974); *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974); *Getman v.*

The courts in *Getman v. NLRB*⁷¹⁶ and *Wine Hobby USA, Inc. v. IRS*,⁷¹⁷ held that "[e]xemption (6) necessarily requires the court to balance a public interest purpose for disclosure of personal information against the potential invasion of individual privacy."⁷¹⁸ Both of these cases concerned requests for lists of names and addresses. In *Getman*, the lists were requested by two law professors who needed to contact employees eligible to vote in certain representation elections in order to complete a study concerning NLRB voting regulations.⁷¹⁹ The court ordered disclosure after finding that the invasion of privacy was "very minimal" and that the study potentially could be of considerable public benefit.⁷²⁰ In contrast, the requester in *Wine Hobby* wanted the information for "private commercial exploitation."⁷²¹ The court refused to release the information "[i]n light of [the] failure by Wine Hobby to assert a public interest purpose for disclosure . . . even though the invasion of privacy in this case [was] not as serious as that considered by the court in other cases."⁷²²

The *Getman* court suggested in a footnote that "a court's decision to grant disclosure under Exemption (6) carries with it an implicit limitation that the information, once disclosed, be used only

NLRB, 450 F.2d 670, 676-77 (D.C. Cir. 1971); *Vaughn v. Rosen*, 383 F. Supp. 1049, 1055 (D.D.C. 1974); *Rabbitt v. Department of the Air Force*, 383 F. Supp. 1065, 1070 (S.D.N.Y. 1974).

In performing the balancing, the courts have considered such factors as whether there may be an invasion of privacy, the nature of the privacy invaded, the extent of the invasion, the public interest that would be served by disclosure, whether the interest could be satisfied without the requested material, see *Getman v. NLRB*, 450 F.2d 670, 674-75 (D.C. Cir. 1971); *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 77-78 (D.C. Cir. 1974), whether the material is available elsewhere, see *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 78 (D.C. Cir. 1974); *Ditlow v. Shultz*, 379 F. Supp. 326, 331-32 (D.D.C. 1974), promises of confidentiality, see *Robles v. EPA*, 484 F.2d 843, 846 (4th Cir. 1973), and whether the affected individual is willing to give permission to release the information. See *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 82-83 (D.C. Cir. 1974).

715. See, e.g., *Robles v. EPA*, 484 F.2d 843 (4th Cir. 1973). See also *Rose v. Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974), cert. granted, 43 U.S.L.W. 3451 (U.S. Feb. 18, 1975) (No. 74-489). This approach is advocated in Note, 40 GEO. WASH. L. REV. 527, *supra* note 700.

716. 450 F.2d 670 (D.C. Cir. 1971).

717. 502 F.2d 133 (3d Cir. 1974).

718. *Getman v. NLRB*, 450 F.2d 670, 677 n.24, quoted in *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 136 (3d Cir. 1974). This interpretation of the exemption is supported by the congressional reports, which indicate that Congress contemplated a balancing of individual privacy interests and the public's right to know. See S. REP. NO. 89-813, *supra* note 310, at 9; H.R. REP. NO. 89-1497, *supra* note 310, at 11; note 700 *supra*.

719. 450 F.2d at 671-72.

720. 450 F.2d at 677.

721. 502 F.2d at 137.

722. 502 F.2d at 137.

by the requesting party and for the public interest purpose upon which the balancing was based."⁷²³ This limited disclosure requirement is contrary to the general rule in FOIA cases that release of information to one requester mandates release of the information to the general public.⁷²⁴ Furthermore, imposing such a requirement presents enforcement problems.⁷²⁵ The limitation is appealing, however, because it may allow for accommodation of both the individual's interest in privacy and the public's interest in disclosure.⁷²⁶

Further and more serious problems arise in applying this balancing approach. As the *Getman* court recognized, the provision in the FOIA that requires disclosure to "any person"⁷²⁷ is "in unavoidable conflict with the explicit balancing requirement of Exemption (6)."⁷²⁸ The court in *Wine Hobby* attempted to reconcile this conflict by arguing that the "any person" provision only applied to non-exempt information and was inapplicable when determining whether material was within an exemption.⁷²⁹ This argument is fallacious because the "any person" provision was specifically intended to prevent agency discretion when deciding whether an exemption applied.⁷³⁰ The conflict will be alleviated to some extent if the courts

723. 450 F.2d at 677 n.24. *Rabbitt v. Department of the Air Force*, 383 F. Supp. 1065, 1070 (S.D.N.Y. 1974), is the only other case in which a court using the balancing approach has ordered disclosure. It did not discuss the question whether disclosure should be limited or general. Courts that have used the balancing test to deny disclosure have not had to face this issue. See *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974) (remanding to the district court); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974); *Vaughn v. Rosen*, 383 F. Supp. 1049 (D.D.C. 1974); *Ditlow v. Shultz*, 379 F. Supp. 326 (D.D.C. 1974). Since these courts did consider the requesters' purposes, they may have assumed that disclosure, if ordered, would be limited.

724. The Act provides that records are to be disclosed to "any person." 5 U.S.C.A. § 552 (a)(3) (Supp. Feb. 1975). See text at note 458 *supra*; K. DAVIS, *supra* note 265, § 3A.4 (Supp. 1970).

725. Note, 40 GEO. WASH. L. REV. 527, *supra* note 700, at 539. Someone, either court or agency, must supervise the use of records to make sure the limitations placed on disclosure are not violated. Courts may have to use detailed orders and contempt citations to enforce the limitations.

726. For example, the purposes of the professors in *Getman* were served by limited disclosure, with only minimal effect on the union members. General publication of the lists could have had more serious consequences, ranging from unwanted mail and callers to annoying and possibly illegal pressures concerning the elections.

727. 5 U.S.C.A. § 552(a)(3) (Supp. Feb. 1975). See text at note 458 *supra*; ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 1; S. REP. NO. 89-813, *supra* note 310 at 5-6.

728. 450 F.2d at 677 n.24. The court felt that the explicit language of exemption six required balancing and added, "In view of the Act's basic purpose to limit discretion and encourage disclosure, we believe that Exemption (6) should be treated as unique, and that equitable discretion should not be imported into any of the other exemptions." 450 F.2d at 674 n.10.

729. 502 F.2d at 136.

730. See text at note 500 *supra*; Note, 40 GEO. WASH. L. REV., *supra* note 700, at 534-35.

follow *Getman* and *Wine Hobby*⁷³¹ and focus on the public benefit of the proposed use of the information rather than on the requester's specific purposes and needs.

Another problem with the balancing approach is that by balancing interests in exemption six cases, less protection may be given to an individual's right to privacy than is given to the interests protected by the other exemptions. The disclosure of some information may result in a serious invasion of privacy; under the balancing approach, the courts nevertheless may release the information because there is an overriding public benefit. The public benefit of disclosure is not considered in determining the applicability of any of the other eight exemptions. For example, if a law professor needed confidential financial information concerning large corporations⁷³² to complete a study of the effectiveness of the SEC, the SEC could withhold the information pursuant to exemption four without considering the public benefit that might result from such a study. It is true that if the exemptions are considered permissive rather than mandatory,⁷³³ the SEC could exercise its discretionary power and balance the public interest in disclosure against the potential competitive harm to the corporations; however, the presumption should be in favor of withholding the information and the requester should have to demonstrate an extraordinary public interest before the exempt information is released.⁷³⁴ The balancing approach suggested by *Getman* and *Wine Hobby* does not seem to involve such a strong presumption against disclosure.

The other interpretation of exemption six is illustrated by *Robles v. EPA*,⁷³⁵ where the Fourth Circuit held that the "clearly unwarranted" clause required only an investigation of the seriousness of the invasion of privacy rather than a balancing of the intrusion on the individual against the public benefit that would result from disclosure.⁷³⁶ The court believed that the "any person" language in

731. Both courts considered the particular purposes of the requester only to decide what public benefits would be gained from disclosure. See text at notes 719-22 *supra*. See also *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974); *Vaughn v. Rosen*, 383 F. Supp. 1049, 1055 (D.D.C. 1974); Note, 62 GEO. L.J. 177, *supra* note 333, at 198 n.152 (1973).

732. Corporations are not afforded protection against an invasion of "personal privacy." See K. DAVIS, *supra* note 265, § 3A.22, at 163-64 (Supp. 1970) ("I think 'personal privacy' always relates to individual"). But see ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 36-37, arguing that corporations might be protected because the APA defines "person" to include a corporation. See 5 U.S.C. § 551(2) (1970).

733. See text at notes 1141-55 *infra*.

734. See text at notes 1156-59 *infra*.

735. 484 F.2d 843 (4th Cir. 1973).

736. 484 F.2d at 846-47. *Rose v. Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3451 (Feb. 18, 1975) (No. 74-489) also seemed to interpret "clearly unwarranted" as requiring only an "investigation into the nature of the privacy interest invaded and the extent of the proposed invasion." 495 F.2d at

section 552(a)(3) of the FOIA precluded consideration of the "need of the public" or the "interest of the plaintiffs" in deciding whether to release information.⁷³⁷ The requester in *Robles* was seeking the results of an EPA study of the radiation levels in homes that were located near a uranium processing plant.⁷³⁸ The court concluded that the intrusion on the homeowners' privacy would not be serious if these results were disclosed because the homeowners had not objected when this information previously had been released to state agencies and other unspecified parties.⁷³⁹

The major problem with this interpretation of "clearly unwarranted" is that it permits disclosure even if that disclosure provides no public benefit or results in public harm. Without balancing, for example, the list of names and addresses requested by the plaintiff in *Wine Hobby* probably would have been released because the court admitted that disclosing the list would result in only a minor invasion of privacy.⁷⁴⁰

Thus, neither judicial interpretation of exemption six sufficiently protects an individual's right to privacy. When interpreting this exemption, the agencies and the courts are left to decide whether it is better to risk serious invasions of privacy when a public benefit is demonstrated or to risk minor invasions of privacy when there is no public benefit.

266. The court never discussed the requester's reasons for wanting the information in deciding whether the invasion of privacy was "clearly unwarranted." However, in discussing the appropriate use of agency discretion to withhold nonexempt information in situations where disclosure would damage the public interest, the court extensively quoted *Getman's* balancing discussion. 495 F.2d at 269-70. This is a misuse of the *Getman* rationale, however, because *Getman* was dealing with discretionary balancing in a case where public benefit would be gained from disclosure. There is language at the end of the *Rose* opinion that indicates that the court might have balanced the public benefit from disclosure against the invasion of privacy if it had found the invasion "clearly unwarranted." 495 F.2d at 270. The court did not have to take this step because it remanded the case to the district court to determine if it was possible to remove identifying details. The two-step analysis suggested in *Rose* of first finding all the conditions of exemption six met and then balancing, is similar to finding exemption six to be permissive. See text at notes 1152-59 *infra*. *Rose* was noted in 6 U. TOLEDO L. REV. 215 (1974).

737. 484 F.2d at 846-47. See also K. DAVIS, *supra* note 265, § 3A.4, at 120-21 (Supp. 1970).

738. 484 F.2d at 844.

739. 484 F.2d at 846-47.

740. Thus, the exemption would not protect individuals from minor invasions of privacy by commercial, political, or criminal organizations because the lack of public interest would be irrelevant to the application of the exemption. For example, a union member might not want his name placed on a political party's mailing list, or a high-bracket taxpayer might not want his name on a public list. If release of a list of names and addresses is only a minor invasion of privacy, these people would have no protection under a no-balancing approach. Although the sale or rental of mailing lists by the government is prohibited by the Privacy Act, 5 U.S.C.A. § 552a(n) (Supp. Feb. 1975), this provision does not apply to FOIA requests for such lists. See text at notes 2124-28 *infra*.

The legislative history seems to support use of the balancing approach;⁷⁴¹ however, there is no evidence that Congress considered the implications of its choice. The best solution to this dilemma is for Congress to strike the words "clearly unwarranted."⁷⁴² The agencies and courts will still have the difficult task of determining when an invasion of privacy is likely to result from disclosure, and the protection given to information under exemption six could be undermined by limiting the scope of the privacy interest. However, the cases indicate that the courts are sensitive to the concept of personal privacy and are willing to recognize unlikely but possible harms that may result from a disclosure of information.⁷⁴³ If this trend in the cases continues, the amended exemption would prevent even minor invasions of privacy. Public benefit would only become relevant if the exemption was considered permissive and a strict balancing test was applied.⁷⁴⁴ Although this proposal would broaden the scope of exemption six, and thus is contrary to the narrow language and construction of the other exemptions, the special protection the right to privacy has been accorded in other areas of the law demonstrates the need to accord this interest special protection under the FOIA.

g. *Investigatory records.* Exemption seven currently provides for the withholding of

" . . . investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would

741. See note 718 *supra*.

742. There is some indication in the legislative history of the 1974 amendments that this proposal may be well received by both the Congress and the President. Cf. note 811 *infra* and accompanying text. The amended version of exemption seven protects from disclosure investigatory records that would "constitute an unwarranted invasion of personal privacy." 5 U.S.C.A. § 552(b)(7) (Supp. Feb. 1975). The word "clearly" was omitted from this language in order to provide greater protection for privacy. See note 811 *infra*. Compare *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971). President Ford has also indicated a desire to protect privacy within the scheme of the FOIA. See the letter from President Ford to Senator Kennedy concerning exemption seven amendments, in 120 CONG. REC. S17,829 (daily ed. Oct. 1, 1974):

I am . . . concerned that an individual's right to privacy would not be appropriately protected by requiring the disclosure of information contained in an investigatory file about him unless the invasion of individual privacy is *clearly unwarranted*. Although I intend to take action shortly to address more comprehensively my concerns with encroachments upon individual privacy, I believe now is the time to preclude the Freedom of Information Act from disclosing information harmful to the privacy of individuals. I urge that you strike the words "clearly unwarranted" from the provision.
(Emphasis original.)

743. See, e.g., *Robles v. EPA*, 484 F.2d 843, 846 (4th Cir. 1973) (the court, in discussing the radioactivity reports at issue, speculated that their release "might even reduce marriage possibilities of the occupants"); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 137 (3d Cir. 1974) (the court feared that disclosure of the mailing lists would involve "[d]isclosure of . . . facts concerning the home and private activities within it," including "the family status" of the individual).

744. See text at notes 1141-59 *infra*.

(A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.⁷⁴⁵

This version of the seventh exemption was enacted as part of the 1974 amendments to the FOIA.⁷⁴⁶ Several members of Congress felt strongly that "the courts have, in narrowly and mechanically interpreting the seventh exemption, strayed from the requirements and spirit of the Freedom of Information Act."⁷⁴⁷ By specifically listing the categories of interests that the exemption is designed to protect, Congress presumably intended that the government be required to show, on the facts of each case, that these interests would be harmed by disclosure.⁷⁴⁸

As originally enacted, the seventh exemption provided for the nondisclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."⁷⁴⁹ This exemption was the subject of much litigation

745. 5 U.S.C.A. § 552(b)(7) (Supp. Feb. 1975).

746. The only other exemption revised by the amendments was exemption one, dealing with national security information. *See* text at notes 506-35 *supra*. The amendments generally concentrated on improving the FOIA's access procedures. *See* S. REP. NO. 93-854, *supra* note 329, at 1; H.R. REP. NO. 93-876, *supra* note 329, at 2.

747. 120 CONG. REC. S9331 (daily ed. May 30, 1974) (remarks of Senator Kennedy). Senator Kennedy also commented: "A series of recent cases in the District of Columbia has applied the seventh exemption of the act woodenly and mechanically and, I believe, in direct contravention of congressional intent when we passed that law in 1966." *Id.*

748. *See id.* at S9330 (remarks of Senator Hart).

749. 5 U.S.C. § 552(b)(7) (1970), *as amended*, 5 U.S.C.A. § 552(b)(7) (Supp. Feb. 1975). The proviso "except to the extent available by law to a party other than an agency" was largely ignored by the courts in applying this exemption. This clause has been interpreted to give a party defendant in an action for a violation of a federal regulatory statute the same discovery rights to obtain investigatory files as are available to persons charged with the violation of federal criminal laws. The defendant would, for example, have the right given to criminal defendants by the Jencks Act, 18 U.S.C. § 3500 (1970), to examine relevant statements of government witnesses who have testified on direct examination. *See, e.g.,* Clement Bros. Co. v. NLRB, 282 F. Supp. 540, 542 (N.D. Ga. 1968); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 712 (E.D. Pa. 1968); Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591, 593-94 (D.P.R. 1967). The clause could be read to allow disclosure of investigatory files only to parties litigating before an agency. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 38. Such an interpretation would effectively defeat the attempt by Congress to make the standing issue immaterial in FOIA cases. *See* Note, 74 COLUM. L. REV. 895, *supra* note 333, at 947-48.

Other courts have interpreted the phrase to be merely a "savings clause," designed

and commentary,⁷⁵⁰ but several major problems concerning its application were either unresolved or resolved in a manner inconsistent with the basic purposes of the FOIA.⁷⁵¹ Because of the uncertainty as to the proper application of the exemption, some agencies were able to use it to withhold information that should have been disclosed.⁷⁵²

The courts relied heavily on the legislative history of the original exemption in attempting to ascertain its scope, since its language gave them little guidance.⁷⁵³ The Senate report refers to two of the

to ensure that the FOIA did not abrogate the rights of parties under other legislation providing for access to information during litigation. *See, e.g.*, *Anchorage Bldg. Trades Council v. HUD*, 384 F. Supp. 1236, 1240-41 (D. Alas. 1974); *B & C Tire Co. v. IRS*, 376 F. Supp. 708, 713-14 (N.D. Ala. 1974); *Williams v. IRS*, 345 F. Supp. 591, 594 (D. Del. 1972), *affd.*, 479 F.2d 317 (3d Cir. 1973). *See also* Koch, *supra* note 333, at 206.

Litigants in FOIA actions have argued that the phrase means that a party litigant in an action or proceeding not involving an agency can obtain investigatory files information to the extent that applicable rules of discovery, such as the Federal Rules of Civil Procedure, would make such information available if the agency were a party. *See, e.g.*, *Weisberg v. Department of Justice*, 489 F.2d 1195, 1203 n.15 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). *Contra*, *Anchorage Bldg. Trades Council v. HUD*, 384 F. Supp. 1236, 1240-41 (D. Alas. 1974). *See* K. DAVIS, *supra* note 265, § 3A.24, at 165 (Supp. 1970); 41 GEO. WASH. L. REV. 93, 105 n.88 (1972).

These different views have not been reconciled by the courts. *See generally* Katz, *supra* note 333, at 1282-84; Koch, *supra*, at 206; Note, 74 COLUM. L. REV. 895, *supra*, at 947-48; Note, 62 GEO. L.J. 177, *supra* note 333, at 199-200; Note, 42 GEO. WASH. L. REV. 869, *supra* note 323, at 870 n.10; 51 TEXAS L. REV. 119, 125-27 (1972).

750. *See* K. DAVIS, *supra* note 265, § 3A.23 (Supp. 1970); Katz, *supra* note 333, at 1277-84; Koch, *supra* note 333, at 206-11; Kramer & Weinberg, *supra* note 333, at 64-67; Project, 1972 DUKE L.J. 115, *supra* note 323, at 154-58; Project, 1971 DUKE L.J. 149, *supra* note 323, at 180-84; Note, 74 COLUM. L. REV. 895, *supra* note 333, at 943-48; Note, 1975 DUKE L.J. 416, *supra* note 333, at 449-55; Comment, 1974 DUKE L.J. 251, *supra* note 333, at 274-80; Note, 1973 DUKE L.J. 178, *supra* note 333, at 200-05; Note, 62 GEO. L.J. 177, *supra* note 333, at 199-305; Note, 56 GEO. L.J. 18, *supra* note 323, at 47-50 (1967); Note, 38 GEO. WASH. L. REV. 150, *supra* note 323, at 158-59; Note, *The Freedom of Information Act: Shredding the Paper Curtain*, 47 ST. JOHN'S L. REV. 694, 721-22 (1973); Note, 8 U. MICH. J. L. REF. 329, *supra* note 333, at 346-49; 47 TUL. L. REV. 1136 (1973); 40 FORDHAM L. REV. 921 (1972); 41 GEO. WASH. L. REV. 93 (1972); 85 HARV. L. REV. 861 (1972); 51 TEXAS L. REV. 119 (1972); 38 U. CIN. L. REV. 570 (1969).

751. *See* 120 CONG. REC. S9331 (daily ed. May 30, 1974) (statement of Senator Kennedy), *quoted* in the text at note 747 *supra*.

752. *See* Nader, *supra* note 333, at 5-7; H.R. REP. NO. 92-1419, *supra* note 327, at 84, where the committee expressed its displeasure with the operation of the FOIA and recommended that section 552(b)(7) be amended; note 802 *infra*. *See also* H.R. REP. NO. 92-1419, *supra*, at 11, 28, 70; Fellmeth, *The Freedom of Information Act and the Federal Trade Commission: A Study in Malfeasance*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 345, 361-66 (1969).

753. *See, e.g.*, *Evans v. Department of Transp.*, 446 F.2d 821, 824 (5th Cir. 1971); *Wellford v. Hardin*, 444 F.2d 21, 23 (4th Cir. 1971); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). The courts have focused on the House and Senate reports. The House report states: "This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. [Exemption seven] is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." H.R. REP. NO. 89-1497, *supra*

purposes of the exemption:⁷⁵⁴ to prevent the premature disclosure of information that "could harm the Government's case in court,"⁷⁵⁵ and to allow the government to "keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation."⁷⁵⁶ The courts generally have taken these two purposes into account in attempting to solve the interpretative problems that have arisen in exemption seven cases⁷⁵⁷ and have concluded that the

note 310, at 11. In its general discussion of the exemptions, the report comments, "Some of the specific categories cover information necessary to protect the national security; others cover material such as the Federal Bureau of Investigation files which are not now protected by law." *Id.* at 2.

The Senate report also discusses the exemption. In directly commenting on it, the report states: "Exemption No. 7 deals with 'investigatory files compiled for law enforcement purposes.' These are the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court." S. REP. NO. 89-813, *supra* note 310, at 9. In its introduction, the report states: "It is also necessary for the very operation of our Government to allow it to keep confidential certain material such as the investigatory files of the Federal Bureau of Investigation." *Id.* at 3. See also ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 37-38.

For discussion of the legislative history of section 552(b)(7), see K. DAVIS, *supra* note 265, § 3A.23 (Supp. 1970); Note, 42 GEO. WASH. L. REV. 869, *supra* note 333, at 872-75; Note, 38 GEO. WASH. L. REV. 150, *supra* note 333, at 158-59.

754. For a discussion of other possible purposes, see text at notes 786-88 *infra*.

755. S. REP. NO. 89-813, *supra* note 310, at 9.

756. *Id.* at 3. The reference to the FBI in both reports, see note 753 *supra*, has led some people to suggest that the FOIA was not intended to affect the FBI's files in any manner. See *The Freedom of Information Act, Hearings on H.R. 5425 and H.R. 4960 Before a Subcomm. of the House Comm. on Government Operations*, 93d Cong., 1st Sess. 152 (1973) (testimony of R. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Department of Justice) [hereinafter 1973 *House Hearings*]. There is no language in the Act itself that indicates that the FBI is to be treated differently from any other agency. The reference to the FBI probably was included for either, or both, of two reasons: because the FBI is the agency most commonly associated with investigations or to protect expressly the "informer's privilege." See Katz, *supra* note 333, at 1281; Note, 42 GEO. WASH. L. REV. 869, *supra* note 323, at 874-75, 886-87. But cf. Weisberg v. Department of Justice, 489 F.2d 1195, 1199-200 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974), where the court noted that it was "not discussing any problem except that of compelled disclosure of Federal Bureau of Investigation investigatory files compiled for law enforcement purposes." (footnote omitted).

757. See, e.g., Wellford v. Hardin, 444 F.2d 21, 23 (4th Cir. 1971) (premature disclosure); Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir. 1970) (premature disclosure); Evans v. Department of Transp., 446 F.2d 821, 824 n.1 (5th Cir. 1971) (confidential materials).

The courts have considered two categories of information to be confidential materials. First, they have assumed that the identity of informants is protected from disclosure by the exemption. See, e.g., Center for Natl. Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 374 (D.C. Cir. 1974); Frankel v. SEC, 460 F.2d 813, 817-18 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972). Second, they have held that the exemption allows agencies to withhold investigative techniques and procedures. See, e.g., Center for Natl. Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 374 (D.C. Cir. 1974); Frankel v. SEC, 460 F.2d 813, 817 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972).

It has been argued that the need to protect the identities of informers is no longer present when the agency has subpoena power to compel testimony or statutory authority to compel the transmittal of information. See Note, 42 GEO. WASH. L. REV. 869, *supra*

words "compiled for law enforcement purposes" indicate that the exemption should apply to all law enforcement proceedings, whether criminal, civil or administrative.⁷⁵⁸ The commentators have agreed with this interpretation⁷⁵⁹ despite the fact that it is based on the less authoritative House report.⁷⁶⁰ The amended version of exemption seven retains this language, and there is no indication in the conference report that Congress intended to alter the courts' construction.⁷⁶¹

One recent case, *Rural Housing Alliance v. Department of Agriculture*,⁷⁶² in reviewing a request for reports of investigations into governmental housing discrimination, examined another aspect of the phrase "compiled for law enforcement purposes." The court focused on the issue whether the reports were compiled for direct law enforcement purposes or as part of the Department of Agriculture's general oversight of its employees:

We think "investigatory files compiled for law enforcement purposes" must be given the same meaning, or a meaning to achieve the same result, whether the subject of the files is a government

note 323, at 878 n.56; 51 TEXAS L. REV. 119, 123 (1972). However, while there is arguably no need for cooperation when the agency can compel the disclosure of information, confidentiality is still needed to encourage persons to come forward with initial reports of law violations. The power to compel testimony is of no use if the agency does not know of the underlying violation.

758. See, e.g., *Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore*, 508 F.2d 945, 949 (4th Cir. 1974); *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 81 n.46 (D.C. Cir. 1974); *Center for Natl. Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370, 373 (D.C. Cir. 1974); *Anchorage Bldg. Trades Council v. HUD*, 384 F. Supp. 1236, 1239 (D. Alas. 1974); *B & C Tire Co., Inc. v. IRS*, 376 F. Supp. 708, 713 (N.D. Ala. 1974); *Williams v. IRS*, 345 F. Supp. 591, 593 (D. Del. 1972), *affd.*, 479 F.2d 317 (3d Cir. 1973); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 711 (E.D. Pa. 1968); *Bristol-Myers Co. v. FTC*, 284 F. Supp. 745, 747 (D.D.C. 1968), *affd.*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); *Clement Bros. Co. v. NLRB*, 282 F. Supp. 540, 542 (N.D. Ga. 1968); *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967).

759. K. DAVIS, *supra* note 265, § 3A.23, at 164 (Supp. 1970); Katz, *supra* note 333, at 1277; Note, 62 GEO. L.J. 177, *supra* note 333, at 199 n.155; Note, 56 GEO. L.J. 18, *supra* note 323, at 47, Note, 42 GEO. WASH. L. REV. 869; *supra* note 323, at 874-75; Note, 38 GEO. WASH. L. REV. 150, *supra* note 323, at 158-59.

760. See H.R. REP. NO. 89-1497, *supra* note 310, at 11, *quoted* in the text at note 753 *supra*. The Senate Report refers to "files prepared by Government agencies to prosecute law violators." S. REP. NO. 89-813, *supra* note 310, at 9.

761. CONFERENCE REPORT, *supra* note 225, at 12-13. In discussing clause (D) of the amended exemption, the report mentions that it applies to "every case where the investigatory records sought were compiled for law enforcement purposes—either civil or criminal in nature" *Id.* at 13. Further, when Senator Hart introduced the amendment to this exemption on the Senate floor, he defended it by saying that "the 'law enforcement' exemption has been broadly construed to include any investigation by a government agency of a federally funded or monitored activity. The courts only require that the investigation might result in some government 'sanction' such as a cutoff of funds—and not necessarily a prosecution." 120 CONG. REC. S9337 (daily ed. May 30, 1974).

762. 498 F.2d 73 (D.C. Cir. 1974).

employee or an ordinary private citizen For the purpose of analyzing the application of exemption 7 in the instant and similar cases, it is therefore necessary to distinguish two types of files relating to government employees: (1) government surveillance or oversight of the performance of duties of its employees; (2) investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions.⁷⁶³

The court concluded that the investigatory files exemption applies to the government's investigation of its own employees if that investigation was made "as to an identifiable possible violation of law."⁷⁶⁴

The term "investigatory files" raised two problems under the original exemption seven, only one of which was resolved by its amendment. The first problem was whether the exemption of all "files" allowed an agency to withhold nonexempt materials by comingling them with exempt materials in a single file.⁷⁶⁵ Several courts rejected agency arguments to this effect and held that the inclusion of otherwise available information in an investigatory file would not protect that information from disclosure.⁷⁶⁶ Congress has attempted to resolve this problem by changing "investigatory files" to "investigatory records."⁷⁶⁷

The second problem was, and still is, whether this language requires that an agency actually conduct an "investigation."⁷⁶⁸ Few courts have considered this issue directly.⁷⁶⁹ In *Center for National*

⁷⁶³ 498 F.2d at 81.

⁷⁶⁴ 498 F.2d at 82. See *Koch v. Department of Justice*, 376 F. Supp. 313, 315 (D.D.C. 1974) (investigatory files may be withheld "if law enforcement was a significant aspect of the investigation for which they were compiled").

⁷⁶⁵ See K. DAVIS, *supra* note 265, § 3A.24, at 165 (Supp. 1970); H.R. REP. NO. 92-1419, *supra* note 310, at 84. It could further be argued that the term "files" might be too narrow, since if strictly applied it could exclude investigatory information stored other than in "files," such as on computer tapes. Cf. text at notes 654-55 & 704-05 *supra*.

⁷⁶⁶ See, e.g., *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427, 429 n.1 (4th Cir.), *cert. denied*, 419 U.S. 834 (1974); *Philadelphia Newspapers, Inc. v. HUD*, 343 F. Supp. 1176, 1179 (E.D. Pa. 1972).

⁷⁶⁷ Speaking in favor of this amendment on the Senate floor, Senator Kennedy quoted a report of the Bar of the City of New York that favored use of the term "records," so that "disclosable material is not exempted merely by being placed in an investigatory file." 120 CONG. REC. S9332 (daily ed. May 30, 1974). See also 2 1973 *Senate Hearings*, *supra* note 125, at 149 (statement of J. Miller, Chairman, Administrative Law Section, American Bar Association).

The new amendments also resolve the comingling problem by requiring the separation and disclosure of the nonexempt portions of requested material. 5 U.S.C.A. § 552(b) (Supp. Feb. 1975). See text at notes 501-05 *supra*.

⁷⁶⁸ See K. DAVIS, *supra* note 265, § 3A.23, at 165 ("[I]nvestigations are often for multiple purposes, for purposes that change as the investigations proceed, and for purposes that are never clarified").

⁷⁶⁹ For example, the court in *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974), said that a separation of the issues of whether a file was "investigatory" and whether it was "compiled for law enforcement purposes"

Policy Review on Race and Urban Issues v. Weinberger,⁷⁷⁰ the court first determined that the files were compiled for law enforcement purposes⁷⁷¹ and then discussed whether files involving agency review of segregation and discrimination in northern public schools were "investigatory."⁷⁷² The plaintiff sought disclosure of the files and claimed that HEW was "engaged merely in administering federal aid programs, and that the documents in question [were] ancillary to that task rather than investigatory in nature."⁷⁷³ The court said that

[t]here is no clear distinction between investigative reports and material that, despite occasionally alerting the administrator to violations of the law, is acquired essentially as a matter of routine. What is clear, however, is that where the inquiry departs from the routine and focuses with special intensity upon a particular party, an investigation is under way. . . . This is the kind of special scrutiny that goes beyond general administration and is properly characterized as an "investigation."⁷⁷⁴

The court recognized that the two elements of the exemption, "investigatory files" and "compiled for law enforcement purposes," obviously fuse and interact.⁷⁷⁵ In applying the exemption, however, the courts should consider the requirements of each phrase separately.

The 1974 FOIA amendments encourage the courts to perform a careful evaluation of the nature of "investigatory records" by authorizing in camera review of the requested materials.⁷⁷⁶ Even without statutory authorization, a number of courts concluded that in camera review was necessary in exemption seven cases.⁷⁷⁷ Now that

was not necessary, and dealt with the two issues together. 498 F.2d at 81 n.47. *But see* Getman v. NLRB, 450 F.2d 670, 673 (D.C. Cir. 1971), where the court found that the files were not "investigatory."

770. 502 F.2d 370 (D.C. Cir. 1974).

771. 502 F.2d at 373.

772. 502 F.2d at 373-74.

773. 502 F.2d at 373. The court recognized that if this characterization were correct, then the material would not be protected under the exemption.

774. 502 F.2d at 373-74.

775. 502 F.2d at 374.

776. 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975). *See* text at notes 965-88 *infra*.

777. For example, in *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726 (N.D. Cal. 1971), the district court refused to accept the government's affidavit as conclusive of the fact that certain records in the Office of the Director of the Immigration and Naturalization Service were investigatory files compiled for law enforcement purposes. The court said: "I think the Government should not be allowed to file an affidavit stating that conclusion and by so doing foreclose any other determination of the fact." 325 F. Supp. at 727. *See, e.g.,* *Evans v. Department of Transp.*, 446 F.2d 821, 823 (5th Cir. 1971); *Ash Grove Cement Co. v. FTC*, 371 F. Supp. 370, 374 (D.D.C. 1973); *Stern v. Richardson*, 367 F. Supp. 1316, 1319 (D.D.C. 1973). *See generally* Note, 42 GEO. WASH. L. REV. 869, *supra* note 323, at 880-84.

Some other courts failed to order in camera review of requested documents and relied on the affidavits of the government agency to decide that the documents were within the exemption. *See, e.g.,* *Aspin v. Department of Defense*, 491 F.2d 24, 27 (D.C.

such review is expressly permitted, the courts should be encouraged to make full use of it in considering investigatory files problems. The amended version of exemption seven is so detailed that an affidavit from an agency stating that the requested materials fall within the exemption should not be conclusive of the legal issues presented.⁷⁷⁸

The most controversial problem in cases under the original exemption seven arose only after the courts had determined that the requested materials were investigatory files compiled for law enforcement purposes. The issue then was whether such materials were automatically exempt, or whether the courts also had to determine that the purposes of the exemption would be best served by nondisclosure.

The early cases concerning investigatory files did look to the purposes of exemption seven, but sometimes construed them very narrowly. For example, in *Bristol-Myers Company v. FTC*,⁷⁷⁹ the district court had dismissed the FOIA complaint and ruled that the material requested fell within the investigatory files exemption.⁷⁸⁰ The court of appeals reversed and remanded, stating that the exemption did not apply unless there was a sufficiently imminent, concrete possibility of enforcement proceedings.⁷⁸¹ The court recognized only one purpose of the exemption, that of preventing the premature disclosure of the government's case.⁷⁸² If the FTC contemplated no further enforcement proceedings against the plaintiff, this purpose would be satisfied and disclosure would be proper.⁷⁸³

Cir. 1973); *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). *See also* Note, 42 GEO. WASH. L. REV. 869, *supra*, at 884-90. *Cf.* *Ditlow v. Brinegar*, 494 F.2d 1073, 1074 (D.C. Cir.), *cert. denied*, 419 U.S. 974 (1974); *Koch v. Department of Justice*, 376 F. Supp. 313, 318 (D.D.C. 1974), where the court did not make an in camera review, but based its decision "upon the apparent investigatory nature of the files, rather than of the individual documents within them . . ." (emphasis original).

778. *Cf.* *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726, 727 (N.D. Cal. 1971), *quoted in* the text at note 777 *supra*; *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir.), *cert. denied*, 415 U.S. 977 (1974).

779. 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

780. 284 F. Supp. 745 (D.D.C. 1968). *See* 38 U. CIN. L. REV. 570 (1969).

781. 424 F.2d at 939-40. The plaintiff sought documents from the FTC relevant to a rule-making proceeding initiated by the FTC on the basis of staff investigations. The particular complaint for which these investigations were performed had been withdrawn more than two years before this rule-making procedure began. 424 F.2d at 939.

782. 424 F.2d at 939 ("The exemption prevents a litigant from using the statute to achieve indirectly 'any earlier or greater access to investigatory files than he would have directly'").

783. *Bristol-Myers* was one of the first cases to consider whether files that at one time were investigatory and compiled for law enforcement purposes remain exempt after it is clear that an actual law enforcement proceeding will not occur. Two distinct judicial lines of reasoning developed on this issue. Some cases followed or agreed with *Bristol-Myers*. *See, e.g.,* *Black v. Sheraton Corp.*, 371 F. Supp. 97, 102 (D.D.C. 1974); *Stern v. Richardson*, 367 F. Supp. 1316, 1321 (D.D.C. 1973); *Legal Aid Soc. v. Shultz*, 349 F. Supp. 771, 777 (N.D. Cal. 1972); *Philadelphia Newspapers, Inc. v. HUD*, 843 F.

While the court was correct in ascertaining one purpose of the exemption,⁷⁸⁴ it ignored the other purposes. One other purpose, clearly discernible from the legislative history, is the protection of confidential information—both the identity of informants and the nature of investigatory techniques and procedures.⁷⁸⁵ A third possible purpose is the protection of the privacy of those investigated.⁷⁸⁶ A fourth possible purpose is the protection of the investigated person's right to a fair trial, free from prejudicial pretrial influences.⁷⁸⁷

Supp. 1176, 1179 (E.D. Pa. 1972); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 470 (D.D.C. 1972); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 711-12 (E.D. Pa. 1968).

Frankel v. SEC, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972), is illustrative of cases reaching the opposite conclusion. That court held that exemption seven applied even after the termination of the investigation and enforcement proceeding for which the documents were compiled, because of the need to protect the confidentiality of informers and investigative techniques. 460 F.2d at 817-18. *See* 47 TUL. L. REV. 1136 (1973); 41 GEO. WASH. L. REV. 93 (1972); 51 TEXAS L. REV. 119 (1972). *Accord*, *Aspin v. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973); *Evans v. Department of Transp.*, 446 F.2d 821, 824 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); *Cowles Communications, Inc., v. Department of Justice*, 325 F. Supp. 726, 727 (N.D. Cal. 1971). *Cf. Weisberg v. Department of Justice*, 498 F.2d 1195, 1202-03 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). *See* text at notes 797-801 *infra*. *See generally* Note, 74 COLUM. L. REV. 895, *supra* note 333, at 945-47; Note, 62 GEO. L.J. 177, *supra* note 333, at 200-05; Note, 42 GEO. WASH. L. REV. 869, *supra* note 323, at 875-80. For a discussion of proposed legislation in earlier sessions of Congress, *see* 47 TUL. L. REV. 1136, 1137-38 (1973).

The 1974 amendment to exemption seven rejects the *Bristol-Myers* rule that the exemption cannot apply if no enforcement proceeding is pending. It also rejects the approach of the *Frankel* court, which did not consider whether in that case, investigative techniques not generally known would in fact have been divulged. 460 F.2d at 817-18, 820. The amended exemption requires the courts to determine on the facts of the particular case that disclosure would actually bring about one of the listed harmful results, which include interfering with enforcement proceedings and disclosing investigative techniques or procedures. 5 U.S.C.A. § 552(b)(7) (Supp. Feb. 1975). The legislative history does indicate that "enforcement proceeding" refers only to "a concrete prospective law enforcement proceeding." 120 CONG. REC. S9330 (daily ed. May 30, 1974) (remarks of Senator Hart).

784. *See* text at note 755 *supra*.

785. *See* text at note 756 *supra*.

786. *See* *Center for Natl. Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370, 374 (D.C. Cir. 1974); 41 GEO. WASH. L. REV. 93, 96-97 (1972). *But see* *Sears, Roebuck & Co. v. General Servs. Admn.*, 384 F. Supp. 996, 1004 (D.D.C. 1974), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974). ("[E]xemption (b)(7) is clearly designed to protect interests of the government only"). The inclusion of a privacy clause in the amendment of the exemption supports the *Center for National Review* court's reading of the original purpose. *See* text at note 811 *infra*.

787. *See* *Philadelphia Newspapers, Inc. v. HUD*, 343 F. Supp. 1176 (E.D. Pa. 1972), where HUD claimed that the disclosure of the names of certain appraisers, who had allegedly appraised dilapidated homes far in excess of their actual value, would subject the potential defendants to the risk of prejudicial pretrial publicity. 343 F. Supp. at 1179. The court, while not ruling out the possibility that the exemption was designed to serve that purpose, held that, under the facts of the case before it, the claims of possible prejudicial publicity were too speculative. 343 F. Supp. at 1182. Again, the inclusion of a clause protecting this right in the 1974 amendment supports HUD's argument. *See* text at note 810 *infra*.

Finally, the exemption might have been designed to increase administrative efficiency by protecting against the disclosure of enforcement records, since such disclosure might discourage voluntary compliance with the law.⁷⁸⁸ By failing to consider these possible purposes, the court gave inadequate protection to the legitimate interests of the government and the public.

Other courts that considered the purposes of exemption seven did recognize the various purposes it sought to achieve. For example, the court in *Wellford v. Hardin*⁷⁸⁹ properly applied the exemption. In *Wellford*, the plaintiff sought disclosure of copies of all of the letters of warning issued since 1965 by the Department of Agriculture to any nonfederally inspected meat or poultry processor suspected of being in interstate commerce, and disclosure of information concerning the detention and ultimate disposition of meat and poultry products. The district court ordered disclosure,⁷⁹⁰ and the Fourth Circuit affirmed. The court of appeals noted that the information sought by the plaintiff was already in the hands of the parties against whom the law was being enforced.⁷⁹¹ The government, therefore, needed no protection against the premature disclosure of its case.⁷⁹² The court thus went on to examine the government's claim that the purpose of protecting confidential materials would be defeated by disclosure. Since the parties to the enforcement proceedings already had the requested information, and since disclosure would reveal neither confidential investigatory techniques nor the identity of informers, confidentiality provided no reason for withholding.⁷⁹³ The court refused to accept the government's claim that the exemption was designed to increase administrative efficiency by protecting against the disclosure of enforcement records.⁷⁹⁴ Finally, the court dismissed the government's argument "that the seventh exemption was intended to protect not only the investigator, but also the investigated."⁷⁹⁵ The approach used by the court in *Wellford*, that of first

788. See *Wellford v. Hardin*, 444 F.2d 21, 24 (4th Cir. 1971). See generally text at notes 808-14 *infra*.

789. 444 F.2d 21 (4th Cir. 1971). See 40 *FORDHAM L. REV.* 921 (1972); 85 *HARV. L. REV.* 861 (1972).

790. 315 F. Supp. 175 (D. Md. 1970).

791. 444 F.2d at 23-24.

792. 444 F.2d at 23-24. See *Wellford v. Hardin*, 315 F. Supp. 175, 178 (D. Md. 1970); *Sears, Roebuck & Co. v. General Servs. Admn.*, 384 F. Supp. 996, 1004 (D.D.C.), stay dissolved, 509 F.2d 527 (D.C. Cir. 1974); *Ditlow v. Volpe*, 362 F. Supp. 1321, 1325 (D.D.C. 1973), *revd. sub. nom.* *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir.), *cert. denied*, 419 U.S. 974 (1974); *Legal Aid Soc. v. Shultz*, 349 F. Supp. 771, 777 (N.D. Cal. 1972). But see *Green v. Kleindienst*, 378 F. Supp. 1397, 1401-02 (D.D.C. 1974).

793. 444 F.2d at 24. See *Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore*, 508 F.2d 945, 949 (4th Cir. 1974).

794. 444 F.2d at 24.

795. 444 F.2d at 24. The government argued that the public disclosure of information in investigatory files could constitute an unwarranted invasion of privacy. The

discerning the purposes of the exemption and then examining the facts to see if disclosure would defeat those purposes, exemplifies the approach contemplated by Congress when it enacted the seventh exemption.⁷⁹⁶

Recently, the Court of Appeals for the District of Columbia⁷⁹⁷ has taken an approach diametrically opposed to that of the *Wellford* court. The District of Columbia court has not considered whether the purposes of the exemption would be furthered by non-disclosure in the particular case. Instead, it has given careful consideration to the questions whether the files were "compiled for law enforcement purposes" and whether they were "investigatory" in nature.⁷⁹⁸ This is determined by an examination of "how and under what circumstances the files were compiled."⁷⁹⁹ If the files fall within these two categories, then the court's duty is "at an end,"⁸⁰⁰ and the files are automatically exempt.⁸⁰¹

court responded by citing the congressional balancing of interests and stated that it was required to defer to the congressional decision. 444 F.2d at 24-25. See *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726, 727 (N.D. Cal. 1971).

The court also addressed the issue whether the disclosure of the information would be a violation of the due process clause. The government argued that disclosure of the warning letters was analogous to posting an individual's name in liquor stores as one to whom alcohol was not to be sold, in that both occurred without notice or hearing. See *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). The court rejected this analogy. 444 F.2d at 25. But see 85 HARV. L. REV. 861, 866-70 (1972).

796. Cf. note 807 *infra*.

Not all courts that have said they were considering the purposes of the exemption have actually done so properly. For example, although the court in *Frankel v. SEC*, 460 F.2d 813, 817-18 (2d Cir. 1972), *cert. denied*, 409 U.S. 889 (1972), noted several purposes, the court failed to examine the particular facts of the case to determine whether these purposes would be served by nondisclosure. The majority rejected the dissent's proposal that the court use in camera review to ascertain if any actual harm would result from disclosure. 460 F.2d at 818, 820 (Oakes, J. dissenting). The court thus apparently missed the point that the SEC had already revealed the names of its witnesses, 460 F.2d at 818 n.3, so that no harm was threatened with respect to the disclosure of informers. See Note, 42 GEO. WASH. L. REV. 869, *supra* note 323, at 877; 51 TEXAS L. REV. 119, 123-24 (1972).

797. See *Center for Natl. Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974); *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir.), *cert. denied*, 419 U.S. 974 (1974); *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); cf. *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974); *Aspin v. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973). For further discussion of these last two cases, see note 801 *infra*. See generally Note, 42 GEO. WASH. L. REV. 869, *supra* note 323.

798. See, e.g., *Center for Natl. Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370, 372-74 (D.C. Cir. 1974); *Ditlow v. Brinegar*, 494 F.2d 1073, 1074 (D.C. Cir.), *cert. denied*, 419 U.S. 974 (1974); *Weisberg v. Department of Justice*, 489 F.2d 1195, 1197-98 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). See text at notes 758-78 *supra*.

799. *Weisberg v. Department of Justice*, 489 F.2d 1195, 1202 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

800. *Weisberg v. Department of Justice*, 489 F.2d 1195, 1203 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

801. This new approach was announced in *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). The plaintiff in *Weisberg*

The amendment of exemption seven was intended by Congress to overrule the approach of the District of Columbia court.⁸⁰² It had

sought disclosure of certain materials gathered by the FBI during its investigation of the assassination of President Kennedy. The court held that "the desired materials were part of the investigatory files compiled by the FBI for law enforcement purposes, and, as such, are exempt from the disclosure sought to be compelled." 489 F.2d at 1197. The court did not discuss whether any of the purposes of the exemption would be defeated by disclosure, *see* Note, 42 GEO. WASH. L. REV. 869, *supra* note 323, at 886-87, and made it clear that it was not necessary to do so. 489 F.2d at 1202-03. However, after announcing that records meeting the two statutory qualifications are automatically exempt, the court did in fact bolster its argument with references to the purposes and legislative history of exemption seven. 489 F.2d at 1198.

The *Weisberg* approach was followed in *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir.), *cert. denied*, 419 U.S. 974 (1974), and in *Center for Natl. Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1970). Congress and the commentators have also included *Aspin v. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973), in the line of cases that follow *Weisberg*. *See* 120 CONG. REC. S9336 (daily ed. May 30, 1974); 42 GEO. WASH. L. REV. 869, *supra* note 323, at 870-71, 887-89 (1974). While *Aspin* does cite the rule announced in *Weisberg*, 491 F.2d at 27, it discusses the purposes of exemption seven at some length in rejecting the need for a concrete prospective enforcement proceeding. *See* 491 F.2d at 28-30. Although the court "note[d] also that . . . *Weisberg* . . . is consistent with our decision in this case," 491 F.2d at 30, it can certainly be argued that *Aspin* does not strictly follow the *Weisberg* rule.

The same argument can be made concerning *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974). The court remanded this case for re-evaluation of the exemption seven claim in light of its decisions in both *Weisberg* and *Aspin*. After stating the *Weisberg* test, however, the court discussed *Aspin* as providing "a more detailed analysis of exemption 7." 498 F.2d at 79-80. It said that "[i]n *Aspin* the purposes of exemption 7 were identified These purposes compelled us there to conclude that the termination of enforcement proceedings was not a cause for withdrawal of exemption 7 protection." 498 F.2d at 80. *See also* *Exxon Corp. v. FTC*, 384 F. Supp. 755, 761-63 (D.D.C. 1974). These cases may indicate that the "new approach" of the D.C. Circuit was not as clearly defined as Congress feared. *See* notes 802-07 *infra* and accompanying text.

802. *See* CONFERENCE REPORT, *supra* note 225, at 12, which states that section 552 (b)(7) was amended to "clarify congressional intent disapproving certain court interpretations which have tended to expand the scope of agency authority to withhold certain 'investigatory files compiled for law enforcement purposes'"; 120 CONG. REC. S9336 (daily ed. May 30, 1974):

[Mr. Kennedy.] I should like to ask the Senator from Michigan a couple of questions.

Does the Senator's amendment in effect override the court decisions in the court of appeals on *Weisberg* against the United States, *Aspin* against Department of Defense; *Ditlow* against *Brinegar*; and *National Center* against *Weinberger*?

As I understand it, the holdings in those particular cases are of the greatest concern to the Senator from Michigan. As I interpret it, the impact and effect of his amendment would be to override those particular decisions. Is that not correct?

Mr. Hart. The Senator from Michigan [sic] is correct. That is its purpose. That was the purpose of Congress in 1966, we thought, when we enacted this. Until about 9 or 12 months ago, the courts consistently had approached it on a balancing basis, which is exactly what this amendment seeks to do.

The need for amendment of exemption seven had been suggested as early as 1972. *See* H.R. REP. NO. 92-1419, *supra* note 310, at 71, noting that it "is accurate to state in a summary fashion, that the courts have been generally reluctant to order the disclosure of Government information falling within . . . exemption (b)(7)." The report recommended several changes in the language of the exemption to direct the courts' attention to the purposes of the exemption when faced with a request for disclosure. *See id.* at 84.

not been included in either the bill proposed to the House⁸⁰³ or that proposed to the Senate,⁸⁰⁴ but was introduced on the floor of the Senate by Senator Hart.⁸⁰⁵ The Senator commented on the recent restrictive interpretation of the exemption⁸⁰⁶ and stated that his amendment was intended to force the courts to require the government to show on the facts of each particular case that the stated interests would be harmed by disclosure.⁸⁰⁷

The exemption as amended lists six categories of interests that it is designed to protect, and authorizes the withholding of investigatory records to the extent necessary to protect those interests.⁸⁰⁸ Thus,

In *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4500-01 (U.S. April 28, 1975), the Supreme Court declined to decide the exemption seven claim, but commented in dicta on the 1974 amendment to the section: "The legislative history clearly indicates that Congress disapproves of those cases . . . which relieve the Government of the obligation to show that disclosure of a particular investigatory file would contravene the purposes of Exemption 7." 43 U.S.L.W. at 4501.

803. H.R. 12471, 93d Cong., 2d Sess. (1974).

804. S. 2543, 93d Cong., 2d Sess. (1974). The Senate committee explained: "The substance of the exemptions contained in the Freedom of Information Act thus remains unchanged by S. 2543, *although by leaving it unchanged the committee is implying acceptance of neither agency objections to the specific changes proposed in the bills being considered, nor judicial decisions which unduly constrict the application of the Act.*" S. REP. NO. 93-854, *supra* note 329, at 7 (emphasis added). Senator Kennedy stated that the committee had considered the amendments before the District of Columbia cases were decided. 120 CONG. REC. S9330-31 (daily ed. May 30, 1974).

It appears that there also was a political reason for not submitting an amended version of exemption seven to the committee. Senator Kennedy, the sponsor of the amendments, feared that the conservative forces on the committee would view substantive amendments to the exemptions unfavorably and that if they were introduced, the bill might never get out of the committee. Telephone interview with Thomas Susman, Assistant Counsel, Subcommittee on Administrative Practice and Procedure of Senate Judiciary Committee, Washington, D.C., Sept. 5, 1974.

805. 120 CONG. REC. S9329 (daily ed. May 30, 1974). The amendment, as originally introduced by Senator Hart, provided:

Section 552(b)(7) is amended to read as follows: "Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication or constitute a clearly unwarranted invasion of personal privacy, (C) disclose the identity of an informer, or (D) disclose investigative techniques and procedures."

Id.

806. "[R]ecently, the courts have interpreted the seventh exception to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes—a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made." *Id.*

807. *See id.* at S9331 (remarks of Senator Kennedy); *id.* at S9329-30 (remarks of Senator Hart): "That [the approach of the D.C. Circuit], we suggest, is not consistent with the intent of Congress when it passed this basic act in 1966. Then, as now, we recognized the need for law enforcement agencies to be able to keep their records and files confidential *where a disclosure would interfere with any one of a number of specific interests*, each of which is set forth in the amendment that a number of us are offering." (Emphasis added.)

808. 5 U.S.C.A. § 552(b)(7) (Supp. Feb. 1975).

nondisclosure is appropriate when disclosure would "interfere with enforcement proceedings,"⁸⁰⁹ or "deprive a person of a right to a fair trial or an impartial adjudication,"⁸¹⁰ or "constitute an unwarranted invasion of personal privacy,"⁸¹¹ or reveal "the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,"⁸¹² or reveal "investigative techniques and procedures,"⁸¹³ or "endanger the life or physical safety of law en-

809. 5 U.S.C.A. § 552(b)(7)(A) (Supp. Feb. 1975). Senator Hart commented:

This would apply whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. In determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding.

120 CONG. REC. S9330 (daily ed. May 30, 1974).

810. 5 U.S.C.A. § 552(b)(7)(B) (Supp. Feb. 1975). See 120 CONG. REC. S9330 (daily ed. May 30, 1974). Cf. note 787 *supra* and accompanying text.

811. 5 U.S.C.A. § 552(b)(7)(C) (Supp. Feb. 1975). Senator Hart's amendment originally provided that disclosure would be inappropriate if it would "constitute a clearly unwarranted invasion of personal privacy." See note 805 *supra*. The Senator's comments made it clear that he intended this language to be interpreted as it had been in exemption six cases. See 120 CONG. REC. S9330 (daily ed. May 30, 1974). The conference committee deleted the word "clearly," see CONFERENCE REPORT, *supra* note 225, at 12, in an attempt to provide the public with a greater degree of protection than that provided by the language and case law of the sixth exemption. Cf. 120 CONG. REC. S17,829-30 (daily ed. Oct. 1, 1974). The conference committee also added that they wished to make it "clear that disclosure of information about a person to that person does not constitute an invasion of his privacy." CONFERENCE REPORT, *supra* note 225, at 13.

812. 5 U.S.C.A. § 552(b)(7)(D) (Supp. Feb. 1975). Senator Hart's original amendment simply provided that information could be withheld when publication would "disclose the identity of an informer." See note 805 *supra*. The conferees substituted the term "confidential source" to make it "clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." CONFERENCE REPORT, *supra* note 225, at 13. The conference report describes this provision as follows:

Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes—either civil or criminal in nature—the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information. However, where the records are compiled by a criminal law enforcement authority, all of the information furnished only by a confidential source may be withheld if the information was compiled in the course of a criminal investigation. In addition, where the records are compiled by an agency conducting a lawful national security intelligence investigation, all of the information furnished only by a confidential source may also be withheld.

Id. (emphasis original). See also 120 CONG. REC. S9332-36 (daily ed. May 30, 1974) (remarks of Senator Hruska).

813. 5 U.S.C.A. § 552(b)(7)(E) (Supp. Feb. 1975). See CONFERENCE REPORT, *supra* note 225, at 12-13: "[The exemption] should not be interpreted to include routine

forcement personnel."⁸¹⁴ In applying the amended exemption seven, the courts should be guided by the approach taken by the court in *Wellford v. Hardin*⁸¹⁵ and use in camera review to examine closely the requested information to determine if it was compiled for law enforcement purposes, if it was compiled as the result of an investigation, and if disclosure would harm any of the specifically listed interests.

Although President Ford agreed with the basic need for revision of exemption seven,⁸¹⁶ he had two major objections to the amendment passed by Congress.⁸¹⁷ These objections were among the reasons

techniques and procedures already well known to the public, such as ballistics tests, fingerprinting, and other scientific tests or commonly known techniques. Nor is this exemption intended to include records falling within the scope of subsection 552(a)(2) of the Freedom of Information law, such as administrative staff manuals and instructions to staff that affect a member of the public." In commenting on this provision, Senator Hart added, "It would not generally apply to techniques of questioning witnesses." 120 CONG. REC. S9330 (daily ed. May 30, 1974).

814. 5 U.S.C.A. § 552(b)(7)(F) (Supp. Feb. 1975). This clause was added by the conference committee. CONFERENCE REPORT, *supra* note 225, at 12.

815. 444 F.2d 21 (4th Cir. 1971). See text at notes 789-96 *supra*. "Until a year ago the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information." 120 CONG. REC. S9330 (daily ed. May 30, 1974) (remarks of Senator Hart).

816. Ford Amendments, *supra* note 529, at 8.

817. The President also raised a third objection to the amendment: He felt that it was impracticable to require law enforcement agencies to devote their efforts "to a paragraph-by-paragraph screening of their files." Ford Amendments, *supra* note 529, at 9. Such screening is required by another amended section of the FOIA, 5 U.S.C.A. § 552(b) (Supp. Feb. 1975), amending 5 U.S.C. § 552(b) (1970), which provides that "any reasonably segregable portion of a record" be disclosed to requesters "after deletions of the portions which are exempt." See text at notes 501-05 *supra*. The President admitted that this consideration did not justify the categorical exemption of all investigatory files, Ford Amendments, *supra*, at 8, but argued that it should not be ignored. He proposed that an agency head be allowed to make a case-by-case finding of impracticability on the basis of various factors reviewable by the courts and sought to add the following proviso to the end of section 552(b)(7):

Provided: That where the agency head, after considering the results of a preliminary examination of the files involved in the request, personally finds, in light of (1) the number of documents covered by the request, (2) the proportion of such documents which consist of reports by Federal or State investigative agents or from confidential sources, and (3) the availability of personnel of the type needed to make the required review and examination, that application of the foregoing tests on a record-by-record basis would be impracticable, the agency may apply such tests to the investigatory file as a whole or to reasonably segregable portions thereof; except that this provision shall not be applied to files which the agency has reason to believe contain records which are not investigatory records compiled for law enforcement purposes, nor shall it protect from disclosure any records which, as a result of the preliminary examination or for any other reason, do not require further significant review or examination.

Id. at 6-7. The concerns of the President for the practical problems faced by an agency in attempting to establish the need for nondisclosure are understandable. However, the problem of balancing various interests was directly faced and resolved by Congress in favor of disclosure. Congress recognized the possibility that agencies will have difficulty finding the time to examine files and thus provided for the extension of time limits if necessary. See text at notes 900-38 *infra*. This time extension

that he gave for vetoing the FOIA amendments.⁸¹⁸ The President first objected to the stringent showing of harmful effect that agencies must make to justify nondisclosure. He argued that, in most cases, an agency could not establish that disclosure "would" cause one of the particular harms listed in the amendment.⁸¹⁹ He proposed that nondisclosure be allowed upon demonstration of a "substantial possibility" that disclosure would harm one of the interests listed.⁸²⁰ The President had not raised this objection in his earlier negotiations with the conference committee,⁸²¹ and Congress rejected this proposal by overriding his veto.⁸²²

The President's second objection concerned the limited protection of confidential sources afforded by the amended exemption.⁸²³ The conference committee had expanded this protection to allow nondisclosure of the identity of a confidential source in both civil and criminal proceedings.⁸²⁴ As enacted, the exemption also permits withholding confidential information obtained either by a criminal law enforcement agency conducting a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, provided that the information was secured solely from a confidential source.⁸²⁵ This protection was not extended, however, to civil law enforcement agencies or to civil investigations.⁸²⁶ The President objected to this limitation on the ground that several agencies perform important civil law-enforcement functions and that these functions often lead to criminal investigations. The President proposed that this protection be extended to cover confidential information gathered in criminal investigations carried out by civil, as well as criminal, law enforcement agencies.⁸²⁷

was designed, at least in part, to provide relief from the burdens created by large requests. See 120 CONG. REC. H10,865 (daily ed. Nov. 20, 1974) (remarks of Representative Moorhead).

818. See 10 WEEKLY COMP. OF PRES. DOCS. 1318 (Oct. 17, 1974); Ford Amendments, *supra* note 529, at 6-9.

819. Ford Amendments, *supra* note 529, at 8.

820. Ford Amendments, *supra* note 529, at 6, 8. The President referred to another reason for establishing a more lenient standard. He argued that since exemption seven protects important individual interests, all efforts should be made to assure that the interests are protected. Changing the required degree of proof would provide a greater measure of protection for these interests. See Ford Amendments, *supra*, at 8; 120 CONG. REC. S19,814 (daily ed. Nov. 21, 1974).

821. See 120 CONG. REC. S17,829 (daily ed. Oct. 1, 1974) (letter from President Ford to Senator Kennedy, Aug. 20, 1974).

822. See text at notes 329-32 *supra*.

823. Ford Amendments, *supra* note 529, at 8.

824. See CONFERENCE REPORT, *supra* note 225, at 13, quoted in note 812 *supra*.

825. See note 812 *supra* and accompanying text. See also 120 CONG. REC. S17,829-30 (daily ed. Oct. 1, 1974) (letter from Senator Kennedy and Representative Moorhead to President Ford, Sept. 23, 1974).

826. See CONFERENCE REPORT, *supra* note 225, at 13, quoted in note 812 *supra*.

827. Ford Amendments, *supra* note 529, at 6, 8.

Although Congress, in overriding the President's veto, rejected this proposal, it is worthy of more serious consideration. It appears that Congress consciously made the decision not to extend the added protection of confidential sources to civil law-enforcement agencies or to civil investigations, but there is no explanation for this decision in the legislative history,⁸²⁸ and it may prove to have been unwise. First, as the President argued in vetoing the amendments, investigations by civil law-enforcement agencies can often lead to criminal investigations and prosecutions, and the same protection of information received from confidential sources may be needed. Second, the need for the complete protection of confidential sources may be as important in civil investigations as it is in criminal investigations, because a confidential source may be equally critical to the success of each. Congress should thus consider extending the protection of exemption seven to all law enforcement agencies conducting either civil or criminal investigations.

h. *Financial institution reports.* Exemption eight covers information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."⁸²⁹ This exemption was designed to protect financial institutions from any adverse consequences that might result from the disclosure of information collected by the government's regulatory agencies.⁸³⁰ It appears to be a continuation and extension of the prior

828. The language of exemption seven was analyzed in CONFERENCE REPORT, *supra* note 225, at 13; 120 CONG. REC. S19,812, S19,815, S19,818-19 (daily ed. Nov. 21, 1974). There is no explanation for the decision to limit the protection of confidential information to criminal and national security investigations.

829. 5 U.S.C. § 552(b)(8) (1970). See generally K. DAVIS, *supra* note 265, § 3A.24 (Supp. 1970); Bennett, *The Freedom of Information Act, Is It a Clear Public Records Law?*, 34 BROOKLYN L. REV. 72, 77 (1967); Note, 62 GEO. L.J. 177, *supra* note 333, at 205-06; Note, 56 GEO. L.J. 18, *supra* note 333, at 50-51; Note, 47 ST. JOHN'S L. REV. 694, *supra* note 750, at 722.

830. S. REP. NO. 89-813, *supra* note 310, at 10; H.R. REP. NO. 89-1497, *supra* note 310, at 11. The Senate report states: "Exemption No. 8 is directed specifically to insuring the security of our financial institutions by making available only to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by, on behalf of, or for the use of such agencies." S. REP. NO. 89-813, *supra*, at 10. The House report comments: "This exemption is designed to insure the security and integrity of financial institutions, for the sensitive details collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm." H.R. REP. NO. 89-1497, *supra*, at 11. See also ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 38:

An earlier version of exemption (4) protected trade secrets, but made no mention of financial information and would not have protected information developed by agency investigators and examiners, as distinguished from information "obtained from the public." Exemption (4) as enacted, however, covers commercial and financial information Exemption (8) emphasizes the intention of the revision to protect information relating to financial institutions which may be prepared for or used by any agency responsible for the regulation or supervision of such institutions.

case law that had established the custom of keeping reports of bank examiners confidential in order to ensure the security and integrity of financial institutions.⁸³¹ Professor Davis is extremely critical of the exemption.⁸³² In his view, it will only increase the tendencies of financial institutions to maintain "systems of secret facts, secret law, and secret policy."⁸³³

Several commentators have noted that the fourth exemption, which protects certain "commercial or financial information,"⁸³⁴ makes this exemption superfluous.⁸³⁵ The *Attorney General's Memorandum* concludes that the purpose of the exemption is to emphasize the congressional intent to protect such information.⁸³⁶

There has been only one reported case dealing extensively with this exemption. In *M. A. Schapiro & Co. v. SEC*,⁸³⁷ the plaintiff brought an action under the FOIA to compel the disclosure of an SEC staff study of off-board trading problems and of all transcripts made and documents received during the study. The court held that the "study and its related transcripts and documents, initiated and gathered for the express purpose of changing trading rules and related practices of national securities exchanges, does not fit within the exception . . ."⁸³⁸ The court also noted that the possibility of harm to the integrity of any securities exchanges or broker-dealers could be precluded by the deletion of all identifying material before disclosure.⁸³⁹

This eighth exemption is probably of little importance because

831. See, e.g., *Bank of America Natl. Trust & Sav. Assn. v. Douglas*, 105 F.2d 100, 103 (D.C. Cir. 1939). Professor Davis, in commenting on *Bank of America*, concluded that the "case shows that at least in some circumstances a court may without statutory assistance require that information in the possession of an administrative agency be kept confidential." 1 K. DAVIS, *supra* note 265, § 3.13, at 229 (1958). See Bennett, *supra* note 829, at 77.

832. See K. DAVIS, *supra* note 265, § 3A.24 (Supp. 1970).

833. *Id.* at 166. Professor Davis noted that this exemption "is . . . in keeping with banking tradition, although that tradition rests heavily on facts of a former day such as uninsured bank accounts and runs on banks. The law is clear, but I still wish the lobbyists for the banking agencies had been less effective." *Id.*

834. 5 U.S.C. § 552(b)(4) (1970). See text at notes 611-47 *supra*.

835. See Note, 62 GEO. L.J. 177, *supra* note 333, at 205 n.197; Note, 56 GEO. L.J. 18, *supra* note 323, at 50. The courts have been quite strict in interpreting exemption four, however, and it is possible that some information protected under exemption eight might not fall within exemption four. Under exemption four, the courts have required that the information be either privileged or confidential, but have narrowly defined the latter category; information is "confidential" if its disclosure will harm the competitive position of the supplier or the government's ability to obtain information. See text at notes 635-38 *supra*. It is conceivable that not all of the information exempted by section eight would meet these criteria.

836. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 38.

837. 339 F. Supp. 467 (D.D.C. 1972). See Note, 62 GEO. L.J. 177, *supra* note 333, at 205-06. See also *Farmers Natl. Bank v. Camp*, 345 F. Supp. 622, 627-28 (D. Md. 1971).

838. 339 F. Supp. at 470.

839. 339 F. Supp. at 470.

of the fourth exemption, and the prospects of a substantial amount of litigation arising under it are few.

i. *Information concerning wells.* Exemption nine protects "geological and geophysical information and data, including maps, concerning wells."⁸⁴⁰ The purpose of this exemption is to assure that geological data filed with government agencies by private oil companies, which arguably might not be covered by the fourth exemption,⁸⁴¹ will be protected from disclosure.⁸⁴² Oil companies are required to file oil and gas findings with federal agencies if they wish to lease government-owned land, and Congress felt that the disclosure of this information would give speculators an unfair advantage.⁸⁴³

There have been no reported cases under exemption nine. The FPC relied on the exemption to deny a request by Ralph Nader for American Gas Association reports and reports prepared by the FPC concerning a survey of the natural gas reserves in the country.⁸⁴⁴

840. 5 U.S.C. § 552(b)(9) (1970). See generally K. DAVIS, *supra* note 265, § 3A.25 (Supp. 1970); Bennett, *supra* note 829, at 77; Dobkin, *The Release of Government-Owned Technical Data Under the Freedom of Information Law: Between Scylla and Charybdis*, 14 VILL. L. REV. 74 (1968); Note, 62 GEO. L.J. 177, *supra* note 333, at 206; Note, 56 GEO. L.J. 18, *supra* note 323, at 51 (1967); Note, 47 ST. JOHN'S L. REV. 694, *supra* note 750, at 723.

841. "It should be noted that, although the information involved in exemption (9) might not be a 'trade secret' within the meaning of the earlier version of exemption (4), it would seem to constitute commercial and financial information covered by the present exemption (4) The addition of exemption (9) is helpful in explaining the intention of the statute with respect to such information." ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 39. The new, narrower interpretation of exemption four, see text at notes 635-38, may make this "helpful" addition more important. Compare note 835 *supra* and accompanying text.

842. H.R. REP. NO. 89-1497, *supra* note 310, at 11. The Senate report, S. REP. NO. 89-813, *supra* note 310, did not comment on this exemption. The House report stated: This category was added after witnesses testified that geological maps based on explorations by private oil companies were not covered by the "trade secrets" provisions of present laws. Details of oil and gas findings must be filed with Federal agencies by companies which want to lease Government-owned land. Current regulations of the Bureau of Land Management prohibit disclosure of these details only if the disclosure "would be prejudicial to the interests of the Government" (43 CFR, pt. 2). Witnesses contended that disclosure of the seismic reports and other exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent millions of dollars in exploration. H.R. REP. NO. 89-1497, *supra*, at 11.

843. See note 842 *supra*, quoting H.R. REP. NO. 1497. Commentators have been unenthusiastic about the value of this exemption. See, e.g., K. DAVIS, *supra* note 265, § 3A.25, at 166 (Supp. 1970) ("I am inclined to believe that the present regulation of the Bureau of Land Management is preferable to what Congress has enacted. Instead of exempting the records from required disclosure, the regulation makes them available unless their disclosure 'would be prejudicial to the interests of the Government'"); Bennett, *supra* note 829, at 77 ("Without disputing the wisdom of the decision to withhold this type of information, it would appear that this constitutes restricting availability, rather than liberalizing availability of public records").

844. 6 1972 House Hearings, *supra* note 326, at 1970-72 (letter from Ralph Nader & David Calfee to John Nassikas, Chairman, Federal Power Commission, Feb. 28, 1972). Mr. Nader contended that the exemption was designed to protect the data and maps, not the estimates of reserves derived from that information. *Id.* at 1971.

The FPC refused to disclose the reports on the ground that the exemption's goal of protecting seismic data and geological maps would be defeated if the reserve estimates were released. It argued that "a competitor's sole interest in seeing such data (seismic data and maps) from his counterpart's wells would in all probability center upon his desire to know or determine the end figure for reserves. If the latter information is disclosed, it becomes a meaningless gesture to withhold the former."⁸⁴⁵ The position of the FPC in this situation seems unnecessarily narrow since the purpose of the exemption is to protect oil company data from speculators, not from other oil companies.

The ninth exemption is superfluous⁸⁴⁶ and little used. It is unlikely that a significant amount of litigation will arise under it.

4. *The Procedural Requirements*

a. *User fees.* Section 552(a)(4) of the FOIA was completely re-drafted by Congress in 1974 in order to reduce the cost of obtaining requested records,⁸⁴⁷ strengthen the Act's judicial enforcement process,⁸⁴⁸ and make agency officials more responsive to FOIA requests.⁸⁴⁹ The changes reflect congressional belief that the "primary obstacles to the [1967] Act's faithful implementation by the executive branch have been procedural rather than substantive."⁸⁵⁰ The fervor of congressional efforts to improve the Act's administration was demonstrated by Congress' complete rebuff of President Ford's veto.⁸⁵¹ President Ford was concerned, among other things, about the impracticability of some of the procedural changes.⁸⁵²

845. *Id.* at 1972-74 (letter from Kenneth F. Plumb, Secretary, Federal Power Commission, to Ralph Nader & David Calfee, May 24, 1972). Mr. Plumb also wrote that "[e]ven if one acknowledges, as you have argued, that this exemption from disclosure is aimed at safeguarding underlying seismic data and geological maps, it is precisely this kind of information which is critical in arriving at the reserves estimates which you argue are not protected from the disclosure requirements." *Id.* at 1973.

846. See Note, 62 GEO. L.J. 177, *supra* note 333, at 206 n.201; Note, 56 GEO. L.J. 18, *supra* note 323, at 51. Cf. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 39.

847. 5 U.S.C.A. § 552(a)(4)(A) (Supp. Feb. 1975).

848. 5 U.S.C.A. §§ 552(a)(4)(B)-(E) (Supp. Feb. 1975).

849. 5 U.S.C.A. § 552(a)(4)(F) (Supp. Feb. 1975).

850. S. REP. NO. 93-854, *supra* note 329, at 1. After holding hearings in 1972 on the implementation of the FOIA, the House Subcommittee on Foreign Operations and Government Information identified six major problem areas, all related to procedural, rather than substantive, aspects of the law. For a summary of these problem areas see H.R. REP. NO. 92-1419, *supra* note 327, at 8.

851. The FOIA amendments passed the House over the President's veto by a margin of 371 to 31. 120 CONG. REC. H10,875 (daily ed. Nov. 20, 1974); N.Y. Times, Nov. 21, 1974, at 19, col. 1 (late city ed.). The Senate passed the amendments by a margin of 65 to 27. 120 CONG. REC. S19,823 (daily ed. Nov. 21, 1974); N.Y. Times Nov. 22, 1974, at 21, cols. 3-4 (late city ed.).

852. See 10 WEEKLY COMP. OF PRES. DOCS. 1318 (1974); Ford Amendments, *supra* note 529, at 3-5; N.Y. Times, Oct. 18, 1974, at 16, col. 3 (late city ed.).

Subsection (a)(4)(A) was enacted to remedy several problems connected with user fees—fees charged by agencies to search for, screen, and copy requested information. Search fees reflect the cost of finding the requested documents; screening fees reflect the cost of having trained analysts segregate and exclude the exempt portions of those documents.⁸⁵³ Under the provisions of (a)(4)(A), each agency must specify a uniform schedule of fees, limited to “reasonable standard charges for document search and duplication and provid[ing] for recovery of only the direct costs of such search and duplication.”⁸⁵⁴ The subsection further provides that the agency may waive or reduce its fees “in the public interest.”⁸⁵⁵

Under the 1967 Act, agencies were only required to publish “rules stating . . . fees to the extent authorized by statute.”⁸⁵⁶ This provision was commonly understood to refer to 31 U.S.C. § 483a, which provides that “each Federal agency is authorized by regulation . . . to prescribe therefor such fee . . . as [it] shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts”⁸⁵⁷ This statute vested agency officials with substantial discretion to determine fee policies, without specific guidance as to its use.

Several problems arose under the 1967 FOIA due to the lack of substantive directives on the assessment of user fees. The first problem was that, although 31 U.S.C. § 483a provided for consideration of public policy interests, most agencies attempted to recover the full costs of fulfilling FOIA requests. A 1959 Bureau of the Budget circular, for example, suggested that

[w]here a service . . . provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service . . . [i]s performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public⁸⁵⁸

853. See text at notes 496-505 *supra*.

854. 5 U.S.C.A. § 552(a)(4)(A) (Supp. Feb. 1975).

855. 5 U.S.C.A. § 552(a)(4)(A) (Supp. Feb. 1975).

856. 5 U.S.C. § 552(a)(3) (1970).

857. This statute was held to apply to FOIA cases in *Reinoehl v. Hershey*, 426 F.2d 815 (9th Cir. 1970), and *Diapulse Corp. of America v. FDA*, 500 F.2d 75 (2d Cir. 1974).

858. U.S. BUREAU OF THE BUDGET, CIRCULAR A-25, § 3(a)(1), Sept. 23, 1959 [hereinafter CIRCULAR A-25], reprinted in 3 1973 *Senate Hearings, supra* note 125, at 468-70. (In 1970 “all functions vested by law . . . in the Bureau of the Budget” were transferred to the President, Reorganization Plan No. 2 of 1970, § 101, 84 Stat. 2085 (1970),

This position was also adopted in the *Attorney General's Memorandum*, which states that "an appropriate fee should be required for searching as well as a fee for copying. Such fees should include indirect costs, such as the cost to the agency of the services of the Government employee who searches for, reproduces, certifies, or authenticates in some manner copies of requested documents."⁸⁵⁹

In 1971, the Administrative Conference of the United States recommended that agencies waive user fees in appropriate circumstances,⁸⁶⁰ but the policy of the Bureau of the Budget circular and the *Attorney General's Memorandum* found favor in practice. As late as 1973, only three of thirty-six agencies surveyed had regulations providing for fee diminution or waiver for individual FOIA information requests that serve a public interest or policy.⁸⁶¹ The general refusal to waive costs for private parties seeking information in the public interest was particularly harsh in view of the policy of some agencies to provide free information to their regulatory subjects.⁸⁶²

The present (a)(4)(A) attempts to solve the waiver problem by providing that "[d]ocuments shall be furnished without charge or

and the Bureau was redesignated the Office of Management and Budget. *Id.* § 102.) This circular and 31 U.S.C. § 483a (1970) provide the bases for agency FOIA user-fee regulations. 5 1972 *House Hearings*, *supra* note 326, at 1381-83 (report of the Freedom of Information Fee Committee).

859. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 26.

860. 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS: RECOMMENDATION 71-2: PRINCIPLES AND GUIDELINES FOR IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT (May 7, 1971) [hereinafter RECOMMENDATION 71-2]. This Recommendation was originally referred to as Recommendation No. 24 and is often referred to as such in the various congressional hearings. The Administrative Conference, however, adopted a new system of numbering in December 1972 and redesignated No. 24 at 71-2. *Id.* at iii-iv.

861. See 1 1973 *Senate Hearings*, *supra* note 125, at 205 (table of agency fees as of March 1, 1973).

A regulation providing for fee waivers was promulgated in 1972 by the Department of Transportation:

Documents may be furnished without charge or at a reduced charge, if the Director of Public Affairs, or the head of the operating administration concerned, as the case may be, determines that waiver or reduction of the fee is in the public interest, because furnishing the information can be considered as primarily benefiting the general public. Examples of requests that may fall within this paragraph are reasonable requests from groups engaged in a nonprofit activity designed for the public safety, health, or welfare; schools; and students engaged in study in the field of transportation.

49 C.F.R. § 7.87(C). In practice, this regulation seems to be working well. As one user stated, "This is a very simple regulation that is in effect and is being used I understand quite successfully by the DOT." 3 1973 *Senate Hearings*, *supra*, at 390 (statement of R. Plessner, Center for the Study of Responsive Law).

862. A representative of the Center for Study of Responsive Law noted: "We have received frequent complaints from citizens who have been charged search fees and xeroxing costs for information which an agency made freely available to its regulatory clients." 2 1973 *Senate Hearings*, *supra* note 125, at 103 (statement of H. Wellford).

at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public."⁸⁶³ This language serves two useful purposes: First, it formally directs agencies to be sensitive to fee waiver situations if the public interest is involved and requires them to promulgate regulations to that effect.⁸⁶⁴ Second, it provides a basis for judicial review of agency waiver determinations.⁸⁶⁵

The second user fee problem that arose under the 1967 Act was that the actual fees charged were sometimes unreasonably high. Since user fees are paid into the Treasury as miscellaneous receipts,⁸⁶⁶ there is no direct economic incentive for agencies to charge high fees. There is, however, an incentive to charge high fees to discourage information seekers. The *Attorney General's Memorandum* suggested that "[c]harging fees may also discourage frivolous requests, especially for large quantities of records the production of which would uselessly occupy agency personnel to the detriment of the proper performance of other agency functions as well as its

863. 5 U.S.C.A. § 552(a)(4)(A) (Supp. Feb. 1975). Cf. RECOMMENDATION 71-2, *supra* note 860.

864. Some indication of congressional intent regarding the meaning of the term "public interest" is provided by the legislative history of (a)(4)(A). The original Senate version of this provision read, in part, "[User] fees shall ordinarily not be charged whenever—(i) the person requesting the records is an indigent individual; (ii) such fees would amount, in the aggregate, for a request or series of related requests, to less than \$3; (iii) the records requested are not found; or (iv) the records located are determined by the agency to be exempt from disclosure under subsection (b)." S. 2543, 93d Cong., 2d Sess. § 1(b)(2) (1974). The conference report gave the following explanation for deleting the above language: "By eliminating the list of specific categories, the conferees do not intend to imply that agencies should actually charge fees in those categories. Rather, they felt, such matters are properly the subject for individual agency determination in regulations implementing the Freedom of Information law." CONFERENCE REPORT, *supra* note 225, at 8.

865. Thus far, no court has been asked to review an agency application of waiver regulations. *But cf.* *Diapulse Corp. of America v. FDA*, 500 F.2d 75 (2d Cir. 1974) (reviewing the question whether screening fees are legally permitted under FDA and HEW regulations). To the extent that an agency determination whether a fee waiver is justified involves questions of fact, the APA's "arbitrary and capricious" review standard, 5 U.S.C. § 706(2)(A) (1970), will apply. Cf. *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-16 (1971); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 181-82 (1965).

866. 31 U.S.C. § 483a (1970). It has been suggested that agencies should be permitted to retain fees that are collected in connection with furnishing records. At present, all such fees must be paid into the United States Treasury . . . and, as a result, some agencies have used the lack of adequate funds and personnel as justification for failure to respond promptly to requests for information. The Freedom of Information Act should be amended to provide that fees collected for copying and furnishing records be retained by the agency, in a special fund, to defray the costs of complying with the statute. 5 1972 *House Hearings*, *supra* note 326, at 1436 (statement of the Section of Administrative Law of the American Bar Association). The Senate committee rejected this proposal, however, stating that it "could unduly encourage the charging of excessive fees by agencies, effectively taxing public access even more." S. REP. NO. 93-854, *supra* note 329, at 12.

service in filling legitimate requests for records."⁸⁶⁷ Of course, "full cost" fees also may discourage legitimate requests. Moreover, the FOIA does not permit inquiry into the interests of the requester in determining whether disclosure is warranted;⁸⁶⁸ setting fees to discourage even "frivolous" requests would seem to violate this policy by allowing agencies to judge the relative value of requests. The great variance in the fees charged by different agencies for essentially similar tasks is evidence that agencies did in fact set rates that reflected their judgments on the type and nature of claims that should be discouraged. For example, copying fees ranged from five cents to fifty cents per page, and search fees varied from three to seven dollars an hour.⁸⁶⁹

Some agencies required that fees for searching and screening large numbers of documents be prepaid. The Department of Agriculture required prepayments of \$85,000 and \$91,840 for two information requests made to its pesticide division.⁸⁷⁰ The FDA required a Ralph Nader consumer action group to prepay \$20,000 before beginning a search for the documents requested by the group; the FDA would not guarantee that any documents would be disclosed, nor would it guarantee that part of the fee would be returned in the event that some of the requested documents fell within the FOIA exemptions.⁸⁷¹ A *New York Times* writer described the prepayment procedure as "research roulette" after prepaying almost \$200 for some newspaper clippings.⁸⁷² Charges were also made that agencies were "commingling" or "contaminating" disclosable records with materials exempt from disclosure, thereby increasing searching and screening charges for those seeking the disclosure of the non-exempt documents.⁸⁷³

Corrective action on the fee size problem was initiated by administrative officials. In 1971, the Administrative Conference recommended that fees for copying documents "be uniform and not exceed the going commercial rate, even where such a charge would not cover all costs incurred by particular agencies,"⁸⁷⁴ that

867. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 26-7.

868. See note 458 *supra* and accompanying text.

869. 1 1973 Senate Hearings, *supra* note 125, at 204 (fee tables); 1973 House Hearings, *supra* note 756, at 92 (fee tables); 2 1973 Senate Hearings, *supra*, at 102-03 (testimony of H. Wellford, Center for the Study of Responsive Law). While the fee tables indicate that the copying fee for the Selective Service System was one dollar per page, this fee apparently included some costs of search as well.

870. 2 1973 Senate Hearings, *supra* note 125, at 103 (testimony of H. Wellford, Center for the Study of Responsive Law).

871. 1 1973 Senate Hearings, *supra* note 125, at 203-04 (testimony of R. Plessner, Center for the Study of Responsive Law).

872. *Id.* at 160 (testimony of H. Bancroft, Executive Vice-President, N.Y. Times, quoting M. Frankel, Washington Bureau Chief, N.Y. Times).

873. See Nader, *supra* note 333, at 9-10.

874. RECOMMENDATION 71-2, *supra* note 860, § (c).

no fee be charged for a routine search, and that, as a rule, no fee be charged for screening exempt records.⁸⁷⁵ This recommendation prompted the Office of Management and Budget to send a memorandum to the heads of all the executive agencies urging them to review their fee schedules. It stated, "Fees should not be established at an excessive level for the purpose of deterring requests for copies of records."⁸⁷⁶ The memorandum did influence nine or more agencies to reduce substantially their reproduction charges.⁸⁷⁷ Furthermore, several agencies complied with another of the Conference's recommendations and did not charge a fee for routine searches.⁸⁷⁸ However, the reductions were not universal and few agencies were willing to eliminate the burdensome screening fees.⁸⁷⁹

Revised section 552(a)(4) seeks to remedy the fee size problem with two directives. First, each agency must "promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency."⁸⁸⁰ This provision invokes the rule-making procedures of section 4 of the APA⁸⁸¹ for agency fee determinations. Thus, general notice of fee determination proceedings must be published in the *Federal Register*; the time, place, nature, and subject of the proceeding must be included in the notice.⁸⁸² Interested persons must also be given the opportunity to submit their views on the fees in controversy.⁸⁸³ Failure to publish notice of the proceedings or to be receptive to public comment on proposed rules will render the fees uncollectible.⁸⁸⁴

875. *Id.*

876. Executive Office of the President, Office of Management and Budget, Memorandum for the Heads of Executive Department and Agencies, May 2, 1972, reprinted in 5 1972 House Hearings, *supra* note 326, at 1391.

877. 1973 House Hearings, *supra* note 756, at 281-82 (testimony of A. Scalia, Chairman, Administrative Conference of the United States).

878. See, e.g., regulations of the following agencies: Department of Justice, 28 C.F.R. § 16.9(b) (1974) (no charge for first quarter-hour); Federal Maritime Commission, 46 C.F.R. § 503.43(c) (1974) (no charge for first half-hour); NASA, 14 C.F.R. § 1206.700 (1974) (no charge for first quarter-hour).

879. The Department of Justice was a leader among the agencies in revising its own regulations to bring them into line with RECOMMENDATION 71-2. 1973 House Hearings, *supra* note 756, at 282 (testimony of A. Scalia, Chairman, Administrative Conference of the United States). However, its revised regulations still provide that a fee may be charged for the screening of documents, where a "broad request" requires a "substantial amount of time." 28 C.F.R. § 16.9(b)(7) (1974).

880. 5 U.S.C.A. § 552(a)(4)(A) (Supp. Feb. 1975).

881. 5 U.S.C. § 553 (1970).

882. 5 U.S.C. § 553(b) (1970).

883. 5 U.S.C. § 553(c) (1970).

884. Failure to publish notice of a proposed rule-making renders the proposed rule ineffective until the proper procedure is followed. See *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972); *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013, 1020-21 (3d Cir. 1972); *Texaco, Inc. v. FPC*, 412 F.2d 740, 744-46 (3d Cir. 1969).

Second, fees must be "limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication."⁸⁸⁵ The amendment follows one of the Conference's recommendations and eliminates charges for screening documents;⁸⁸⁶ however, it rejected the suggestion that routine search fees be eliminated.⁸⁸⁷

The elimination of screening fees should discourage agency use of the "commingling" or "contamination" technique.⁸⁸⁸ Costs can no longer be run up by integrating exempt and nonexempt documents so as to require extensive screening time by paid specialists. It may be argued, however, that this elimination unduly burdens agencies by not allowing them to recover their legitimate screening costs, which may be substantial if the number of documents requested is large. Thus, it may be thought that a preferred solution would be to allow the recovery of screening fees with a provision for waiver in the public interest. Reliance would then be placed on judicial review to remedy the charging of unreasonable fees. Congress apparently felt that the "contamination" problem was severe enough, and the power of judicial review was limited enough, to justify an irrebuttable presumption that screening fees are unreasonable.⁸⁸⁹ It may also have hoped that the elimination would encourage agencies to develop more efficient screening, recording, and indexing systems to offset some of the cost burden.

But cf. United States v. Elof Hansson, Inc., 296 F.2d 779, 781-82 (C.C.P.A.), *cert. denied*, 368 U.S. 899 (1960) (where all interested parties had actual notice of the rule-making and where objection to lack of notice was not timely, the rule was effective).

885. 5 U.S.C.A. § 552(a)(4)(A) (Supp. Feb. 1975).

886. Although the amended section 552(a)(4)(A) does not expressly mention screening charges, the conference report clearly indicates that the congressional intent was not to permit such charges: "[E]ach agency [is] required to issue its own regulations for the recovery of *only* the direct costs of search and duplication—not including examination or review of records" CONFERENCE REPORT, *supra* note 225, at 8 (emphasis added).

887. See text at note 875 *supra*. The amendment also failed to adopt another Conference recommendation—the suggestion that copying fees be uniform for all agencies. See text at note 874 *supra*. The Senate bill would have empowered OMB to promulgate uniform fees, see S. 2543, 93d Cong., 2d Sess. § 1(b)(1) (1974), but the provision was dropped in conference.

Although the lack of a uniform fee schedule for copying means that some agencies may be able to charge more than what the uniform fee would be, it also means that some agencies can charge less. For example, the EEOC is able to maintain its five-cents per copy rate, see 29 C.F.R. § 1610.17(a) (1974), and NASA can continue to charge only seven-cents per copy for nontechnical documents. See 14 C.F.R. § 1206.700 (b) (1974).

888. See text at note 873 *supra*.

889. Thus, even when President Ford, after his veto, proposed a provision that would allow the agencies to recover some of the costs incurred in servicing particularly burdensome requests by permitting screening fees to be charged if the cost exceeded \$100, see Ford Amendments, *supra* note 529, at 4, Congress refused to modify the amendments.

It is arguable that agencies may retain inefficient indexing and storage systems to increase search fees and that search fees also should be eliminated. Search fees may be distinguished from screening fees, however, in the ability of courts to review their reasonableness. Screening fees will depend on the nature and subject matter of the documents sought. Some agencies may be forced to take more care in their screening than others, and some documents within any agency will require more attention than others. Thus, it is hard to determine, on the basis of screening fees charged for past requests, what screening fees are reasonable for present requests. Search fees, however, are based on relatively simple tasks and should be directly proportional to the number of documents sought. Accordingly, Congress apparently felt that the assessment of search fees involves little risk of abuse.

The language of the amendment in providing for the recovery of "direct costs,"⁸⁹⁰ rather than for the recovery of "full costs" as provided in 31 U.S.C. § 483a and the Bureau of the Budget circular,⁸⁹¹ may indicate that the amendment contemplates the recovery of a smaller category of expenses than did these other directives. The legislative history does not indicate what may be included as "direct costs." In view of the "full cost" tradition, seen above in the fees charged by agencies under the 1967 FOIA,⁸⁹² Congress probably intended that "direct costs" be narrowly defined. For example, the fee for copies made on a machine that is used only incidentally for FOIA activities should be limited to the marginal costs of those copies and should not include an allocation of the machine's capital cost.⁸⁹³

An agency's assessment of FOIA user fees will be subject to judicial scrutiny.⁸⁹⁴ For an agency to compute its fees, it must make fundamental decisions as to the definition of "direct costs" and "search expense." To the extent that an agency, in defining these terms, will be interpreting the language of the FOIA, the court

890. By linking copy fees to the "direct costs" of reproduction, the fees are likely to vary among the agencies notwithstanding the use of uniform criteria, because of the differences in costs among the agencies. See SOURCEBOOK, *supra* note 319, at 339.

891. See text at notes 856-58 *supra*.

892. See text at notes 858-59 *supra*.

893. In determining which costs should be included in user charges under the original FOIA, the Attorney General suggested that "the services of the Government employee who searches for, reproduces, certifies, or authenticates" should be considered "indirect costs" and should be included. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 26. Thus, these and similar costs were probably not intended to be included within the meaning of the term "direct costs."

894. In reviewing such an assessment under the original FOIA, the Second Circuit stated: "[A]n attempt to condition [disclosure of records] upon payment of unlawful fees would be the sort of improper withholding of material that 5 U.S.C. § 552(a)(3) gives the district courts jurisdiction to enjoin." *Diapulse Corp. of America v. FDA*, 500 F.2d 75, 78 (1974).

would seem to be able to exercise broad de novo review of these agency interpretations.⁸⁹⁵ In some cases, the review standard has been narrowed to whether the agency decision has a "warrant in the record and a reasonable basis in law"⁸⁹⁶ so as to give deference to agency expertise.⁸⁹⁷ However, it is difficult to argue that agencies concerned with the implementation of federal communications acts, for example, have unassailable cost accounting expertise.⁸⁹⁸ If agencies have properly interpreted the statute, their fact findings on the actual costs incurred by individual requesters are subject to review under the more limited "arbitrary and capricious" standard.⁸⁹⁹

b. *Time limits.* Congress created section 552(a)(6) in 1974 to rectify the problem of dilatory agency responses to FOIA requests. The provision requires that agencies determine within ten days whether to comply with a disclosure request, and that agencies determine all appeals from their initial nondisclosure decisions within twenty days.⁹⁰⁰ Time extensions of up to ten days are permitted in defined "unusual circumstances."⁹⁰¹ If an agency fails to respond

895. "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (1970). Thus, in *Diapulse Corp. of America v. FDA*, 500 F.2d 75 (2d Cir. 1974), the court stated that "[s]ince the issue . . . is whether the proposed fees were legally authorized, there is no need for the agency to develop a detailed factual record for purposes of decision, nor is there any area for the exercise of discretion." 500 F.2d at 78. See also *Barlow v. Collins*, 397 U.S. 159, 166 (1970); 4 K. DAVIS, *supra* note 265, § 30.06 (1958).

896. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944).

897. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *Gray v. Powell*, 314 U.S. 402 (1941); Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470 (1950); 4 K. DAVIS, *supra* note 265, § 30.05 (1958).

898. Cf. *Diapulse Corp. of America v. FDA*, 500 F.2d 75, 78 (2d Cir. 1974) ("[O]n this legal question of authorization, agency expertise is of little help to a reviewing court").

899. The "arbitrary, capricious . . . abuse of discretion" standard of 5 U.S.C. § 706(2)(A) (1970), is generally applied to an agency's fact findings, in informal rule-making. In some cases, however, a broader standard of review has been applied. Thus, in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), an FCC rule, promulgated pursuant to informal "notice-and-comment" rule-making, 5 U.S.C. § 553 (1970), was subject to the standard whether it was "supported by substantial evidence that it will promote the public interest." 406 U.S. at 671. See generally Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

900. 5 U.S.C.A. § 552(a)(6)(A) (Supp. Feb. 1975).

901. "[U]nusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request, or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

5 U.S.C.A. § 552(a)(6)(B) (Supp. Feb. 1975).

within the applicable time limits, a requester may seek judicial enforcement.⁹⁰² In such a case, a court is authorized to retain jurisdiction and allow the agency additional time to meet the request "[i]f the government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request. . . ."⁹⁰³ If an agency determines that it should disclose the requested documents, "the records shall be made promptly available to such person making such request."⁹⁰⁴

Under the 1967 Act, there were no specific deadlines for agency compliance with FOIA requests.⁹⁰⁵ The lack of deadlines resulted in long time delays for decisions on requests.⁹⁰⁶ In early 1972, a special task force created by the Congressional Research Service of the Library of Congress conducted a study of the implementation of the FOIA.⁹⁰⁷ It found that the average time for an agency response to an initial request was thirty-three days and that the average time for an agency decision on appeal was fifty days.⁹⁰⁸

These delays significantly hindered the successful use of the FOIA by several groups of requesters. For example, a representative of the Oil, Chemical, and Atomic Workers International Union told a Senate subcommittee that the union had made efforts to obtain Occupational Safety and Health Administration standards regarding

902. 5 U.S.C.A. § 552(a)(6)(C) (Supp. Feb. 1975) provides: "Any person making a request to any agency for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph." Once administrative remedies have been exhausted, a requester may seek judicial relief. See notes 954-61 *infra* and accompanying text.

903. 5 U.S.C.A. § 552(a)(6)(C) (Supp. Feb. 1975).

904. 5 U.S.C.A. § 552(a)(6)(C) (Supp. Feb. 1975).

905. See generally Gianella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 AD. L. REV. 217, 243-52 (1971).

906. *Id.* at 223.

907. Congressional Research Service of the Library of Congress, *The Administration of the Freedom of Information Act*, in 4 1972 *House Hearings*, *supra* note 326, at 1333-43 [hereinafter Library of Congress Study].

908. *Id.* at 1337. The data were based on a survey taken between July 4, 1967, and July 4, 1971.

There is evidence that much longer delays occasionally occur. For example, the ACLU requested records pertaining to new parole board criteria from the U.S. Parole Board. It had to wait two months before the Board sent notification of its decision not to comply with the request. After the ACLU threatened to sue, and another twenty days had passed, the Board reconsidered its initial denial. 2 1973 *Senate Hearings*, *supra* note 125, at 53 (statement of J. Shattuck, Staff Counsel, ACLU). In August 1972, the Center for the Study of Responsive Law submitted a request to the Department of Justice for information concerning the business-review proceedings of the Antitrust Division. The Center realized that these records had been withheld in the past and wanted to obtain a denial so that this policy of withholding could be challenged in court. Even though published regulations of the Justice Department specifically stated that the information requested was confidential, it took six months to get a final agency denial. 1973 *House Hearings*, *supra* note 756, at 334 (statement of R. Plesser).

occupational exposure to toxic chemicals and records of violations of those standards in plants where union members were employed.⁹⁰⁰ He stressed the fact that the union needed the information promptly, so that immediate action could be taken, if necessary, to safeguard employees' health.⁹¹⁰ The media's obvious need to obtain information quickly was also frustrated by agency delays; it has been suggested that the delays were a major reason for the media's failure to make use of the Act effectively.⁹¹¹

In response to these problems, the Administrative Conference of the United States in 1971 recommended establishing an FOIA response-time deadline of ten days.⁹¹² By 1974, a few agencies had incorporated time limits in their regulations.⁹¹³ Most agencies, however, continued to object to any attempt to legislate specific time limits.⁹¹⁴ The reaction of the Department of Justice is typical:

[A] rigid requirement for a quick answer where time does not permit the examination of the records in question, any needed consultation with concerned agencies and knowledgeable personnel, or a resolution of legal and policy doubts, will in our judgment tend to result in denials. Denial will be seen as the safe and cautious thing

909. 2 1973 Senate Hearings, *supra* note 125, at 70-71 (statement of A. Mazzocchi, Citizenship-Legislative Director).

910. *Id.*

911. See H.R. REP. NO. 92-1419, *supra* note 327, at 8; Arnold, *The New Rules on Freedom of Information*, N.Y. Times, Feb. 16, 1975, § 4, at 16, col. 1 ("The Reporters Committee for Freedom of the Press in Washington estimates that there were only a half a dozen or so major press attempts to get information through the provisions of the old act"). See also 1973 House Hearings, *supra* note 756, at 46 (statement of C. Black, Editor, Philadelphia Inquirer), 48 (testimony of R. Smyser, Editor, The Oak Ridger). The FOIA has recently proved to be a useful tool for investigative journalists, however. Clark, *supra* note 324, at 750-51. See, e.g., N.Y. Times, Nov. 10, 1974, at 1, col. 1 (AEC release of documents relating to nuclear reactor safety hazards obtained through threats of FOIA suits).

912. RECOMMENDATION 71-2, *supra* note 860, § (B)(4).

913. E.g., Department of Justice, 28 C.F.R. §§ 16.5, 16.7 (1974) (10 days on initial determinations, 20 days on appeals); Department of Labor, 29 C.F.R. §§ 70.47, 70.51 (1974) (15 days on initial determinations, 30 days on appeals). While no statistics on the effectiveness of these time limits are available, representatives of the Department of Justice and the Federal Energy Administration indicated that the appeals and initial deadlines were being met in roughly half the cases. Interview with Robert Saloschin, Chairman, Freedom of Information Committee, Department of Justice, in Washington, D.C., Nov. 4, 1974; Interview with Charles Snowden, Information Officer, Federal Energy Administration, in Washington, D.C., Nov. 21, 1974. This suggests that the average response time is now less than the Library of Congress Study data indicate. See text at note 908 *supra*. Although a comprehensive study to update this data was scheduled to have begun in early 1974, see Department of Justice, Interagency Symposium on Improved Administration of the Freedom of Information Act 109-16 (Nov. 29, 1973) [hereinafter Interagency Symposium], it was never undertaken. Interview with Robert Saloschin, *supra*.

914. See generally 1973 House Hearings, *supra* note 756, at 365-411 (collection of agency comments on H.R. 5425, 93d Cong., 1st Sess. (1973), which contained a ten-day limit for the initial agency determination and a twenty-day limit for the agency decision on appeal).

to do, on the theory that if a mistake is made in denying it can be easily rectified on appeal . . . whereas a mistake in granting access would be irremediable.⁹¹⁵

Because most agencies did not, on their own, adopt time limits in their regulations, Congress was forced to codify such limits in 1974.

President Ford specifically objected to section 552(a)(6) in vetoing the 1974 FOIA amendments.⁹¹⁶ He argued that the time restrictions were impracticable: "Because of the large number of documents often requested, their decentralized location and the importance of other agency business it would often be impossible to comply with requests in the time allotted."⁹¹⁷ The President's proposed time limit provision would have allowed an agency thirty days for the initial determination and a single fifteen-day extension. Additionally, he proposed that an agency could petition the district court for "such further extension or extensions as may be needed," to be granted if the court is persuaded the agency is proceeding with due diligence.⁹¹⁸ His arguments were apparently unpersuasive, for Congress passed the bill over his veto without comment on these proposals.⁹¹⁹

In view of the agencies' stated dislike of time deadlines, the effectiveness of section (a)(6) will depend on both how the agencies use the time extension provision and how the courts apply the Act's enforcement machinery. The amended FOIA permits agencies to take a ten-day extension only in special cases. As the conference committee stated, "This 10-day extension may be invoked by the agency only once—either during initial review of the request or during appellate review."⁹²⁰ If an agency does not take action within this time, the requester is permitted to bring suit, but the court, upon a showing that exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, may allow the agency to take additional time.⁹²¹ Thus, despite the rigid ten- and twenty-day deadlines, (a)(6) permits some measure of court-supervised flexibility.

The 1974 House bill had not included a provision for extension

915. *Id.* at 174 (answers to written questions submitted by the House Subcomm. on Foreign Operations and Government Information).

916. "[T]he ten days afforded an agency to determine whether to furnish a requested document and the twenty days afforded for determinations on appeal are, despite the provision concerning unusual circumstances, simply unrealistic in some cases. It is essential that additional latitude be provided." 10 WEEKLY COMP. OF PRES. DOCS. 1318 (1974).

917. Ford Amendments, *supra* note 529, at 5.

918. *Id.* at 3-4.

919. See note 851 *supra*.

920. CONFERENCE REPORT, *supra* note 225, at 11.

921. 5 U.S.C.A. § 552(a)(6)(C) (Supp. Feb. 1975).

of the ten- and twenty-day periods,⁹²² but the conference committee, in drafting the final version of the 1974 amendments, accepted the more liberal provision of the Senate bill.⁹²³ The Administrative Law Section of the American Bar Association had pointed out the defect in the House proposal: "By failing to provide any grounds for obtaining an extension of time, [it] could well tend to force the agencies to deny a request that might have been granted had more time for deliberation been allowed."⁹²⁴ The factors favoring some explicit provision for a time extension in special circumstances are particularly compelling in the case of a large agency like the Department of Defense. A spokesman for that Department stated that a provision that failed to provide for any time extensions would be

totally impracticable in a large organization with multiple facilities The millions of records in the custody of the Department of Defense are stored in a multitude of worldwide locations, where records requested under the Freedom of Information Act are interspersed in common files with other records. Requested records are, therefore, difficult to retrieve and evaluate for releasability, and obviously no determination can be made and conveyed to the requester pending that retrieval.⁹²⁵

The major weakness of section 552(a)(6) is that its enforcement mechanism is not designed to ensure that requesters receive prompt action on their requests. If the applicable time periods expire before the agency acts, the statute declares that the requester is deemed to have exhausted his administrative remedies and so may pursue his request in the courts.⁹²⁶ But, for example, if an agency waits ten days before denying a request, the requester appeals, and the agency then improperly takes thirty days to respond to the appeal, rather than twenty,⁹²⁷ the requester will have been forced to wait thirty days before filing suit, and may have to wait up to an addi-

922. See H.R. 12471, 93d Cong., 2d Sess. § 1(c) (1974).

923. See S. 2543, 93d Cong., 2d Sess. § 1(c) (1974).

924. 1973 *House Hearings*, *supra* note 756, at 314 (statement of J. Miller, Jr., Chairman, Section of Administrative Law, American Bar Association). The Administrative Conference of the United States agreed with this assessment: "[Mandatory deadlines] would, in our view, impose an undesirable rigidity on the system and, most important, would probably tend to encourage a fairly rapid and unsympathetic disposition." Interagency Symposium, *supra* note 913, at 124 (statement of R. Berg, Executive Secretary).

925. Letter from J. Fred Buzhardt, Office of General Counsel, to Chet Holifield, Chairman, House Comm. on Government Operations, May 7, 1973, in 1973 *House Hearings*, *supra* note 756, at 368.

926. 5 U.S.C.A. § 552(a)(6)(C) (Supp. Feb. 1975). See note 902 *supra*.

927. Section 552(a)(6) carefully defines the circumstances in which a ten-day time extension may be taken. See note 901 *supra*. If an agency takes such an extension in other than the defined circumstances, it presumably has violated the time limits and thus triggered the judicial enforcement provision.

tional thirty days for an answer to his complaint.⁹²⁸ Further delay may result from the time required for a trial and a judicial decision.⁹²⁹ Only the potential assessment of attorney fees under subsection 552(a)(4)(E)⁹³⁰ or the potential of Civil Service Commission (CSC) action under subsection 552(a)(4)(F)⁹³¹ serve to deter such dilatory conduct.

Whether agencies will take unnecessary delays is difficult to predict. It may be that, in order to prevent abuses, the 1974 amendments should have included some sort of damages provision. Damages could be assessed at a specified per diem rate, escalating according to the length of the delay.⁹³² The penalty should not depend on a showing of actual damage to the requester. One of the themes of the FOIA is that information should be available to "any person," regardless of his ability to show a "need to know."⁹³³ If the requester is not required to make this showing before invoking the FOIA, he should not be forced to demonstrate that the nondisclosure caused him economic injury before he is allowed to invoke sanctions against a dilatory agency.

In resolving the problem of administrative delay under the FOIA, Congress tried to accommodate both the interests served by requiring rigid deadlines and those served by allowing agencies to determine carefully whether disclosure is warranted. Permitting judicial review upon expiration of the time limits offers flexibility to an agency with a legitimate need for more time and provides a requester with a process for impartial review of an agency delay. The weakness of the provision is the delay that is now inherent in invoking judicial review. If this delay becomes a serious problem, Congress should consider adopting more rigid time limits or assessing a per diem statutory penalty for unjustifiable agency delay.

There is one final problem with (a)(6): while the section imposes time deadlines for the determination whether to comply with a request, it does not provide time deadlines for the actual disclosure of the records sought, once the request has been granted.⁹³⁴ It states

928. See text at note 997 *infra*.

929. See text at notes 1008-13 *infra*.

930. See text at notes 1016-71 *infra*. Even if a requester's complaint was mooted by an agency decision to disclose the documents, an award of attorney fees may still be possible. See text at notes 1027-29 *infra*.

931. See text at notes 1072-97 *infra*.

932. The suggestion was made during the congressional hearings that assessing a penalty of \$100 per day against agencies that wrongfully delay disclosure would speed up agency processes and encourage a more favorable agency response. 5 1972 *House Hearings*, *supra* note 326, at 1432 (testimony of B. Fensterwald, Jr.).

933. See note 458 *supra* and accompanying text.

934. See 1973 *House Hearings*, *supra* note 756, at 276-77 (statement of A. Scalini, Chairman, Administrative Conference of the United States). Thus, even in cases involv-

only that "[u]pon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request."⁹³⁵ Ironically, the "promptly available" standard is identical to the language in the provision of the original FOIA that led to the long response-delays discussed above.⁹³⁶ Judicial enforcement is available, with the potential sanctions of the assessment of attorney fees⁹³⁷ and CSC disciplinary action,⁹³⁸ but the time required for judicial action effectively nullifies its use in this area. Congress should establish specific time limits, with or without a damage sanction, to encourage agencies promptly to turn over nonexempt records to requesters.

c. *Reports to Congress.* Section 552(d) provides:

On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

- (1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;
- (2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;
- (3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;
- (4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;
- (5) a copy of every rule made by such agency regarding this section;
- (6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and
- (7) such other information as indicates efforts to administer fully this section.

ing standard types of records where the agency can locate the records easily and give an immediate determination whether to disclose them, the actual disclosure could be delayed. For example, the FCC regulations require that "[a]ll formal and informal complaints against common carriers filed under . . . this chapter, all documents filed in connection therewith, and all communications related thereto" shall be "routinely available for inspection" in the regional offices. 47 C.F.R. § 0.455(c)(13) (1974). If such records were requested, the Commission could make an immediate decision whether to disclose the records and yet delay the actual disclosure for several days or longer.

935. 5 U.S.C.A. § 552(a)(6)(C) (Supp. Feb. 1975).

936. See 5 U.S.C. § 552(a)(3) (1970).

937. 5 U.S.C.A. § 552(a)(4)(E) (Supp. Feb. 1975).

938. 5 U.S.C.A. § 552(a)(4)(F) (Supp. Feb. 1975).

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.⁹³⁹

In order to ensure that it was receiving full and adequate information on the operation of the FOIA, so that it could properly exercise its legislative oversight function, Congress included this section in the 1974 FOIA amendments, requiring the agencies and the Attorney General to file annual reports. This provision was included in response to the statements of several witnesses at the Senate hearings, who believed that "a primary problem with agency compliance with the FOIA is the absence of significant continuing pressures towards liberal disclosure of information."⁹⁴⁰ An earlier congressional report had concluded that "no changes in law and no directives from agency heads will necessarily convince any secrecy-minded bureaucrat that public records are public property. Only day-to-day watchfulness by the Congress and the administration leaders can guarantee the freedom of government information which is the keystone of a democratic society."⁹⁴¹ The congressional reports on this provision make it clear that Congress intends to utilize the annual reports to ensure that its intent is effectuated by the agencies.⁹⁴²

939. 5 U.S.C.A. § 552(d) (Supp. Feb. 1975).

940. S. REP. NO. 93-854, *supra* note 329, at 32. The new provisions also impose an implicit duty on the Attorney General and the Department of Justice to encourage agency compliance. S. REP. NO. 93-854, *supra*, at 33.

941. H.R. REP. NO. 92-1419, *supra* note 327, at 9.

942. The Senate report comments in part:

Periodically, but irregularly, over the past six years the Subcommittee on Administrative Practice and Procedure has asked for reports by agencies on denials of information under the FOIA. (*E.g.*, The Freedom of Information Act: Ten Months Review, Senate Subcommittee on Administrative Practice and Procedure, May 1968). The committee believes that the collection and analysis of these reports, providing the occasion for the Congress to identify recalcitrant agencies, recurring misinterpretations of the mandates of the FOIA, and undue delays can go a long way toward encouraging adherence to the Act. The committee thus concludes that reporting should be regularized.

S. REP. NO. 93-854, *supra* note 329, at 32-33. The House report states:

These annual reports should detail the information necessary for adequate Congressional oversight of freedom of information activities. They would also include the number of each agency's determinations to deny information, the number of appeals, the action on appeals with the reasons for each determination, and a copy of all rules and regulations affecting this section. Also, to be included is a statement of fees collected under this section, plus other matter regarding information activities indicative of the agency's efforts under this Act.

H.R. REP. NO. 93-876, *supra* note 329, at 8. The conference committee report explains the differences between the original House and Senate bills and adds some insight on the provision:

5. Judicial Enforcement

a. *Judicial review.* Subsection (a)(4)(B) provides the basis for judicial review of an agency's decision to withhold records. The subsection gives courts jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."⁹⁴³

Prior to 1974, the FOIA's judicial review provision was incorporated in subsection (a)(3),⁹⁴⁴ so that it was unclear whether it was meant to apply when information was wrongfully withheld under subsections (a)(1) or (a)(2). However, the Court of Appeals for the District of Columbia found:

[I]f the agency refuses to comply with paragraphs (1) or (2) it is then subject to suit under the processes spelled out in paragraph (3) [now paragraph (4)]. The only viable interpretation of this paragraph is that the judicial process is available to compel the disclosure of agency records *not* made available under paragraphs (1) and (2) as well as the agency records referred to in paragraph (3). Congressional intent (although not spelled out directly anywhere) seems to have been that judicial review would be available for a violation of any part of the Act, not merely for subsection (3).⁹⁴⁵

The House bill provided that each agency submit an annual report, on or before March 1 of each calendar year, to the Speaker of the House and the President of the Senate, for referral to the appropriate committees of the Congress. Such report shall include statistical information on the number of agency determinations to withhold information requested under the Freedom of Information law; the reasons for such withholding; the number of appeals of such adverse determinations with the result and reasons for each; a copy of every rule made by the agency in connection with this law; a copy of the agency fee schedule with the total amount of fees collected by the agency during the year; and other information indicating efforts to properly administer the Freedom of Information law.

The Senate amendment contained similar provisions and added two requirements not contained in the House bill, (1) that each agency report list those officials responsible for each denial of records and the numbers of cases in which each participated during the year and (2) that the Attorney General also submit a separate annual report on or before March 1 of each calendar year listing the number of cases arising under the Freedom of Information law, the exemption involved in each such case, the disposition of the case, and the costs, fees, and penalties assessed under the law. The Attorney General's report shall also include a description of Justice Department efforts to encourage agency compliance with the law.

The conference substitute incorporates the major provisions of the House bill and two Senate amendments. With respect to the annual reporting by each agency of the names and titles or positions of each person responsible for the denial of records requested under the Freedom of Information law and the number of instances of participation for each, the conferees wish to make clear that such listing include those persons responsible for the original determination to deny the information requested in each case as well as all other agency employees or officials who were responsible for determinations at subsequent stages in the decision.

CONFERENCE REPORT, *supra* note 225, at 13-14.

943. 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975).

944. 5 U.S.C.A. § 552(a)(3) (1970), as amended, 5 U.S.C.A. §§ 552(a)(3), (4) (Supp. Feb. 1975).

945. *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 701 (1969) (emphasis original);

Congressional intent seems to have been made clear by the 1974 amendments, which moved the judicial review provision into subsection (a)(4). In spite of the fact that (a)(1) and (a)(2) include their own sanction provisions,⁹⁴⁶ the conclusion that (a)(4)'s judicial processes must also apply to those subsections seems compelling;⁹⁴⁷ otherwise the statute would create a right without a remedy by denying the public an effective means to compel compliance with its provisions.⁹⁴⁸

Parties seeking a judicial disclosure order may file a complaint in "the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia"⁹⁴⁹ One problem that may arise is that a claimant must bring the proper agency into the case. Ordinarily, the agency in possession of the desired documents is easily ascertainable. Some agencies, however, are created pursuant to executive order with limited life spans. Thus, FOIA suits against the President's Commission on Law Enforcement and Administration of Justice,⁹⁵⁰ the National Advisory Commission on Civil Disorders,⁹⁵¹ and the President's National Commission on the Causes and Prevention of Violence⁹⁵² were held to have abated when those agencies had filed their final reports and terminated without successors. In one case,⁹⁵³ the termination did not occur until after the complaint had been filed. The nonexistence of the defendant agency deprived the plain-

footnote omitted). See *Irons v. Schuyler*, 321 F. Supp. 628 (D.D.C. 1970), *affd. on other grounds*, 465 F.2d 608 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972) (ordering the United States Patent Office to produce and disclose an (a)(2) index); *National Prison Project of the ACLU Foundation, Inc. v. Sigler*, 390 F. Supp. 789 (D.D.C. 1975). Professor Davis agrees with this interpretation and argues that even if section 552(a)(4) could not be applied to enforce sections 552(a)(1) and (2), the courts could enforce these sections through the exercise of their general equity jurisdiction and through the general provisions of the APA on judicial review, 5 U.S.C. §§ 701-06 (1970). K. DAVIS, *supra* note 265, § 3A.10 (Supp. 1970). Cf. *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 18-20 (1974).

946. See text at notes 386-89 & 447 *supra*.

947. Professor Davis has interpreted the *Attorney General's Memorandum* as implicitly acquiescing in this conclusion, at least with respect to section 552(a)(2). See K. DAVIS, *supra* note 265, § 3A.10 (Supp. 1970).

948. See *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 701 (1969).

949. 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975). The original provision, 5 U.S.C. § 552(a)(3) (1970), established venue in the same places, except that it provided no independent basis of venue for the District of Columbia. In amending the FOIA to establish concurrent jurisdiction in the District of Columbia, the Senate Judiciary Committee noted that over one third of the reported FOIA cases had been brought in the District of Columbia, thus vesting the D.C. district courts with substantial expertise in this area of law. S. REP. NO. 93-854, *supra* note 329, at 12-13.

950. *Skolnick v. Parsons*, 397 F.2d 523 (7th Cir. 1968).

951. *Skolnick v. Kerner*, 435 F.2d 694 (7th Cir. 1970).

952. *Skolnick v. Campbell*, 454 F.2d 531 (7th Cir. 1971).

953. *Skolnick v. Kerner*, 435 F.2d 694 (7th Cir. 1970).

tiffs of disclosure in these cases, despite the fact that the records sought must still have been in the hands of some branch of the government.

Even if a requester has filed a complaint against the appropriate agency, the suit may be summarily dismissed if he has not exhausted his administrative remedies.⁹⁵⁴ Generally, an FOIA claimant whose request is denied by an agency must appeal the initial determination within the agency, usually within a specified time,⁹⁵⁵ as a condition of exhausting his administrative remedies: "When agency action is subject to appeal to higher administrative authority, the administrative remedy obviously has not been exhausted until the higher authority has acted."⁹⁵⁶ This doctrine, however, is subject to various

954. The Supreme Court, in *McKart v. United States*, 395 U.S. 185 (1969), stating that "[t]he doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law," 395 U.S. at 193, articulated the policies underlying the doctrine:

A primary purpose is, of course, the avoidance of premature interruption of the administrative process [S]ince agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages.

395 U.S. at 193-94. For a general discussion and compilation of cases on this doctrine, see 3 K. DAVIS, *supra* note 265, §§ 20.01-10 (1958, Supp. 1970).

955. See, e.g., 6 C.F.R. § 102.41 (1974) (Cost of Living Council; 30 days); 4 C.F.R. § 303.9 (1975) (Cost Accounting Standards Board; 7 days).

956. 3 K. DAVIS, *supra* note 265, § 20.08, at 104 (1958). See *Tuchinsky v. Selective Service Sys.*, 418 F.2d 155, 158 (7th Cir. 1969) ("In the event of an adverse decision denying plaintiff the information, he can appeal to the appeal board, and finally seek the administrative review of the national director Only by this method is the administrative process exhausted and the judicial process available for suit"); Clark, *supra* note 324, at 749-50. Cf. *Bannerkraft Clothing Co. v. Renegotiation Bd.*, 415 U.S. 1 (1974).

It has been suggested that the agency appeal step be eliminated in order to secure more rapid disclosure. 1 1973 *Senate Hearings*, *supra* note 125, at 211 (testimony of R. Nader); 2 1973 *Senate Hearings*, *supra*, at 59 (testimony of P. Schuck, Consumers Union of the United States, Inc.), 164 (testimony of R. Plessner). The FTC has instituted a one-step process, see 16 C.F.R. § 4.11 (1974), that reportedly works faster than the typical two-tiered procedure. See 2 1973 *Senate Hearings*, *supra*, at 164 (statement of R. Plessner).

It is difficult to evaluate the efficacy of the agency appeal process in the absence of more recent and complete data than is currently available. A Library of Congress study of requests during a four-year period (1967-1971) found that 37 of 296 (12 per cent) agency appeals during the period were reversed on appeal and that another 42 (14 per cent) were reversed in part on appeal. See Library of Congress Study, *supra* note 907, at 1338-39. In July 1973 the Department of Justice promulgated an order, 28 C.F.R. § 50.9(a) (1974), requiring that the Department be consulted before agencies make final denials and stating that the Department will not defend an agency in an FOIA suit unless there has been such consultation. See text at note 1003 *infra*. A study of agency consultations with the Department of Justice's FOI Committee between Sept. 1, 1973, and Feb. 28, 1974, indicates that the Committee recommended total or partial disclosure in 30 percent of the cases on which it was consulted. M. Goldberg, *The Impact of the Recommendations of the Department of Justice's Freedom of Information Committee: An Empirical Study*, June 28, 1974, at 10 (unpublished report, on file with the *Michigan Law Review*). Its advice is followed by the agencies in virtually all cases. *Id.* at 17. Although it is difficult to draw conclusions on the basis of this rather sketchy

exceptions.⁹⁵⁷ Thus, in *Diapulse Corp. of America v. FDA*,⁹⁵⁸ the Second Circuit prevented the FDA from assessing a screening fee for an information request, despite the fact that no administrative appeal from the initial agency determination was taken. The court stated that "on the facts of this particular case exhaustion of administrative remedies was not necessary."⁹⁵⁹ A particularly important exception to the general rule of exhaustion was created by the 1974 amendments to the FOIA: they set strict time limits for agency responses to requests and provide that a claimant is deemed to have exhausted his administrative remedies when those limits have expired.⁹⁶⁰ This provision prevents the agencies from delaying requests for long periods of time and later arguing in court that the administrative process had not yet run its course.⁹⁶¹

data, it appears that about 30 per cent of initial denials are reversed, in whole or in part, on appeal. The chief benefit of the intra-agency appeal in these cases is that a requester can obtain the desired information without the costs and delays of litigation. Cf. text at notes 1280-89 *infra*. However, it appears that in the majority of cases the intra-agency appeal does not affect the outcome and results only in an added delay in the review process. Under section 552(a)(6)(A)(ii) of the amended FOIA, this delay may be as long as 20 days; if a 10-day extension under section 552(a)(6)(B) is taken, the delay may be as long as 30 days. See text at notes 900-01 *supra*.

One possible alternative to the current procedure would be to make the agency appeal optional. A requester who is denied information at the initial agency level would have the choice of seeking judicial review immediately or avoiding the immediate costs of litigation by pursuing the administrative appeal. If the agency is bypassed, the agency could still reconsider its initial decision before actively defending the suit. If such an optional procedure is implemented, the requester should probably not be awarded attorney fees pursuant to section 552(a)(4)(E) in cases where the agency reverses its initial determination before defending the suit, since such costs could have been avoided by taking the agency appeal.

957. See *McKart v. United States*, 395 U.S. 185 (1969); K. DAVIS, *supra* note 265, §§ 20.01-10 (1958, Supp. 1970); Layton & Fine, *The Draft and Exhaustion of Administrative Remedies*, 56 GEO. L.J. 315, 322-28 (1967).

958. 500 F.2d 75 (2d Cir. 1974).

959. 500 F.2d at 78. In reaching this conclusion, the court examined the purposes of the exhaustion doctrine and concluded that there be no "premature interruption of the administrative process" nor would judicial review at this stage interfere with the exercise of the agency's expertise since the issue in the case was the purely legal question of authorization. Cf. note 895 *supra*. However, the decision not to require exhaustion in this case may be of limited precedential value for most FOIA cases. It appears that the FDA has a three-step of review process: First, the FDA makes the initial determination. Second, the Commissioner of the FDA reviews this initial determination. Finally, the Assistant Secretary of HEW for Public Affairs must concur in any decision on review to deny a request for information. 45 C.F.R. § 5.82 (1974). The court indicated that although the second step was not exhausted, the Commissioner had supported the initial determination. The court concluded from this fact that "[t]here is no chance . . . that the FDA will correct any possible error." 500 F.2d at 78. The court did not require the final step to be exhausted, partly because that step was first created while the requests were being processed, and "[i]t seemed likely that neither of the parties were aware of the amendments" 500 F.2d at 78.

960. See note 902 *supra* and accompanying text.

961. Note that one of the commonly recognized exceptions to the exhaustion requirement is when existing administrative remedies are inadequate. See K. DAVIS, *supra* note 265, § 20.07 (1958, Supp. 1970). Long delay in agency proceedings may be sufficient

Once an FOIA case is accepted, the Act directs the court to make a de novo determination whether the agency is improperly withholding agency records.⁹⁶² The court may independently judge both the legal and factual issues in the case; thus, it may evaluate for itself the merits of withholding particular documents.⁹⁶³ The burden of proof is explicitly placed on the agencies to sustain their withholding of the requested documents.⁹⁶⁴

b. *In camera inspections.* Courts have frequently utilized in camera inspections—inspections in the privacy of the judge's chambers—of requested material in order to determine whether the material falls under the protection of one of the FOIA exemptions.⁹⁶⁵ The original FOIA did not explicitly mandate the in camera inspection procedure, and, in *EPA v. Mink*,⁹⁶⁶ the Supreme Court held that it should not be used in national security (exemption one) cases. The 1974 FOIA amendments have effectively overruled the *Mink* holding by including a new subsection, (a)(4)(B), that provides, "[T]he court . . . may examine the contents of . . . agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section"⁹⁶⁷ This subsection thus permits, but does not require, courts to use the procedure in all FOIA cases.

There is an important advantage to be gained from the general use of in camera inspections. Complicated and delicate judgments

to invoke the "inadequacy" exception. See, e.g., *Deering Milliken, Inc. v. Johnston*, 295 F.2d 856 (4th Cir. 1961); *Sunshine Publishing Co. v. Summerfield*, 184 F. Supp. 767 (D.D.C. 1960). See generally Note, *Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Proceedings*, 72 YALE L.J. 574 (1963).

962. 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975), formerly 5 U.S.C. § 552(a)(3) (1970).

963. See S. REP. NO. 89-813, *supra* note 310, at 8: "That the proceeding must be de novo is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion"; 4 K. DAVIS, *supra* note 265, § 29.10 (1958). Several state open-records laws include similar provisions. See statutes cited in note 1268 *infra*.

964. 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975), formerly 5 U.S.C. § 552(a)(3) (1970).

965. See, e.g., *Rose v. Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974), cert. granted, 43 U.S.L.W. 3451 (U.S. Feb. 18, 1975) (No. 74-489) (exemption six); *Cutler v. CAB*, 375 F. Supp. 722 (D.D.C. 1974) (exemption four); *Stern v. Richardson*, 367 F. Supp. 1316, 1318 (D.D.C. 1973) (exemptions two, five, and seven). See also Comment, *supra* note 669.

966. 410 U.S. 73, 84 (1973).

967. 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975) (emphasis added). In his veto message to Congress, President Ford made it clear that he objected to giving courts unfettered discretion to use the in camera inspection procedure in exemption one cases. See Ford Amendments, *supra* note 529, at 2. He proposed that a proviso be added to exemption one, stating in part that "[t]he court may examine [classified] records in camera only if it is necessary, after consideration by the court of all other attendant material, in order to determine whether such classification is proper." *Id.* at 1 (emphasis added). Congress rejected the proposal and passed the amendments over his veto. See text at notes 329-32 *supra*.

often must be made in deciding whether material is exempt or whether deletions should be made from records ordered to be disclosed. An actual inspection of the material in question may often be necessary to allow the judge to look behind an agency claim that an exemption applies. Without such a procedure, the court would be forced to defer to the agency's judgment in many cases. There are, however, some disadvantages associated with the procedure. First, secret judicial proceedings run counter to constitutional and traditional notions of the judicial process.⁹⁶⁸ Second, an essential due process safeguard is absent, since the *in camera* process is non-adversarial and hence does not give one of the litigants full access to crucial facts.⁹⁶⁹ Third, no record, which can serve as a basis for appeal or as precedent, is produced by the process. Finally, *in camera* inspection of a great mass of documents without the help of an adversarial sharpening of the issues may place a great burden on judicial time and energy.⁹⁷⁰

Under the amended version of the Act, the courts will be faced with balancing these advantages and disadvantages in order to decide whether to employ the *in camera* procedure. Some circumstances may justify forgoing the *in camera* procedure in favor of other verification procedures. The conference report suggests that the use of alternative procedures be routinely considered: "Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure."⁹⁷¹ Admittedly, these alternative procedures may place strong reliance on agency judgments, but that may be justifiable in certain cases. For example, some of the exemptions involve fairly clear-cut criteria, capable of verification by procedures that do not require a detailed investigation of the actual contents of the documents in question.⁹⁷² Exemptions three (information exempted by other statutes),⁹⁷³ eight (reports of financial institutions),⁹⁷⁴ and nine (information concerning wells)⁹⁷⁵ require only data on whether the named concerns, typically of an easily identifiable character, are mentioned in the documents. Affidavits from government officials in possession of the documents may be sufficient to verify this, and the disadvantages

968. Cf. U.S. CONST. amend. VI ("the right to speedy and *public* trial") (emphasis added).

969. See Comment, *supra* note 669, at 559 n.19.

970. *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

971. CONFERENCE REPORT, *supra* note 225, at 9.

972. See Comment, *supra* note 669, at 566-81.

973. See text at notes 568-610 *supra*.

974. See text at notes 829-39 *supra*.

975. See text at notes 840-46 *supra*.

of the in camera procedure could thus be avoided. If an exemption's criteria are vague, as in exemption one (national security interests),⁹⁷⁶ or if the agency might have a strong self-interest in withholding, as in exemption five (agency memoranda),⁹⁷⁷ and two (personnel rules)⁹⁷⁸ cases, in camera inspection should be used, because sole reliance on the judgment of government employees becomes more questionable. Furthermore, where the material is of a highly sensitive nature and secrecy is an overriding concern, as in exemption one cases, alternative procedures could be instituted to protect confidentiality. For example, the court could allow affidavits from government employees or the submission of a representative document for court inspection to serve as evidence of the material's status under the exemption.⁹⁷⁹

Once it is determined that an in camera inspection should be conducted, courts must adopt procedures to minimize its disadvantages. In one recent case, the District of Columbia Court of Appeals suggested, in a paragraph in a slip opinion, that counsel may participate in an in camera inspection.⁹⁸⁰ This procedure would allow for adversarial issue-sharpening, and it would give nongovernment parties access to the disputed information; however, it would seriously affect the secrecy of the in camera process. Upon a special motion by the government and a rehearing, this paragraph was deleted from the published opinion.⁹⁸¹ Thus, it seems unlikely that participation by counsel in in camera hearings will be readily accepted in the near future.

The leading case on in camera procedure is *Vaughn v. Rosen*, decided in 1973 by the District of Columbia circuit court.⁹⁸² Here the court squarely faced the problems presented by in camera inspection and recommended several procedures to eliminate some of the disadvantages of the process: a detailed analysis by the government of the materials at issue and its reasons for withholding them,

976. See text at notes 506-35 *supra*.

977. See text at notes 648-99 *supra*.

978. See text at notes 536-67 *supra*.

979. The use of such procedures in exemption one cases would give practical effect to President Ford's proposal. See note 967 *supra*.

980. *Rural Housing Alliance v. Department of Agriculture*, No. 73-1771, slip. op. at 19 (D.C. Cir. June 3, 1974) (reported at 498 F.2d 73). The paragraph stated: "We refer RHA's suggestions of counsel's participation in in camera inspection to the District Judge on remand. Such participation by counsel may be allowed by the District Judge in his discretion, under appropriate protective orders, if he finds such participation necessary to his comprehension of the arguments and thus to a fair and correct resolution of the case."

981. Interview with Richard Wolf, Institute for Public Interest Representation, in Washington, D.C., July 31, 1974.

982. 484 F.2d 820, on remand, 383 F. Supp. 1049 (D.D.C. 1974). See Comment, *Vaughn v. Rosen: Toward True Freedom of Information*, 122 U. PA. L. REV. 731 (1974); 87 HARV. L. REV. 854 (1974).

to prevent government agencies from hiding behind conclusory and generalized allegations of exemptions;⁹⁸³ a system to separate and index materials, to allow for partial disclosure of large documents or files and to limit the practice of overburdening the court with large quantities of documents;⁹⁸⁴ and the possible use of a master to assist the adversary process by examining and evaluating the documents for the trial judge.⁹⁸⁵ Although these procedures place a heavy burden on government agencies, the court justified its recommendations on the basis of the FOIA's statement that "the burden is on the agency to sustain its action [of withholding agency records]."⁹⁸⁶ The *Vaughn* procedures have been followed in a few cases,⁹⁸⁷ but it is still too early to assess their effect. The case suggests that the judicial system will have to gradually build up a set of rules to determine when and how the in camera procedure should be employed in the enforcement of the FOIA.⁹⁸⁸ The task will not be an easy one.

c. *Stays of related agency proceedings.* Several FOIA plaintiffs have sought to use the courts' equitable powers to enjoin ongoing agency proceedings pending the final resolution of an FOIA disclosure suit. In *Renegotiation Board v. Bannerkraft Clothing Co.*,⁹⁸⁹ the plaintiffs sought the disclosure of specified Renegotiation Board records and a preliminary injunction against further Board proceedings. The Board argued that Congress, by specifying the reme-

983. 484 F.2d at 826.

984. 484 F.2d at 827.

985. 484 F.2d at 828. Appointment of a master may pose problems under FED. R. Civ. P. 53(b), which requires "exceptional circumstances" for this procedure. Comment, *supra* note 669, at 561 n.33; 87 HARV. L. REV. 854 (1974).

986. 484 F.2d at 823, citing 5 U.S.C. § 552(a)(3) (1970), as amended, 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975).

Note that, on remand, the district court in *Vaughn* declined to use the recommended procedures on the ground that they would be too expensive. 383 F. Supp. 1049, 1052 (D.D.C. 1974). Instead, the agency submitted "representative" documents for in camera inspection, and the court based its decision on those. This is not an indication that the D.C. Circuit has abandoned the *Vaughn* procedure, however. In a later case, the court again remanded for use of these procedures. See *Pacific Architects & Engrs., Inc. v. Renegotiation Bd.*, 505 F.2d 383, 385 (D.C. Cir. 1974).

987. See *Koch v. Department of Justice*, 376 F. Supp. 313, 316 (D.D.C. 1974); *Cutler v. CAB*, 375 F. Supp. 722, 724 (D.D.C. 1974); *Stern v. Richardson*, 367 F. Supp. 1316, 1318 n.3 (D.D.C. 1973). But cf. *Exxon Corp. v. FTC*, 384 F. Supp. 755, 761 (D.D.C. 1974) ("*Vaughn* did not lay down a *per se* rule to be applied to every Freedom of Information Act case . . . [I]t is within the court's discretion to determine whether a particular *in camera* submission requires an index, and, if so, the degree of specificity required"); Note, 42 GEO. WASH. L. REV. 869, *supra* note 323, at 889 (arguing that *Vaughn* has not been applied in exemption seven cases).

988. Compare *Cuneo v. Schlesinger*, 484 F.2d 1086, 1093 (D.C. Cir. 1973) (Bazelon, J., concurring), with Comment, *supra* note 982, and 87 HARV. L. REV. 854 (1974).

989. 415 U.S. 1 (1974). See generally Note, 1975 DUKE L.J. 416, *supra* note 333, at 418-24.

dies available to a complainant under the FOIA, meant to preclude courts from exercising their traditional equitable powers to enjoin an ongoing agency proceeding.⁹⁹⁰ The Supreme Court, after studying the legislative history behind the FOIA, concluded that the express remedies of (a)(4) were not exclusive; Congress had not deprived the courts of their equitable power to order other injunctive relief.⁹⁹¹ However, the Court held that injunctive interference was improper, at least with respect to renegotiation proceedings: "The nature of the renegotiation process mandates this result, and, were it otherwise, the effect would be that renegotiation, and its aims, would be supplanted and defeated by an FOIA suit."⁹⁹²

Other courts, dealing directly with the issue, have been reluctant to stay administrative proceedings and have demanded that the plaintiff show a danger of irreparable harm if such relief is not granted. One court, for example, while recognizing that the courts have jurisdiction to enjoin agency proceedings pending resolution of an FOIA claim, refused to enjoin an NLRB proceeding because there was no "cogent showing" that the plaintiff, the complainant in an unfair labor practice charge before the NLRB, would suffer irreparable injury from the nonavailability of certain NLRB documents.⁹⁹³ The court stated:

It may be that Sears will be held entitled to the documents under the Information Act, and it may be that its possession of those documents will be a convenience, indeed a significant help, in its litigating stance. But those considerations are of a different order from the kind of irreparable injury required to interrupt an administrative proceeding. Should Sears' claim to the memoranda be upheld on appeal and should it appear that there was significant adverse impact on Sears in the unfair labor practice charge proceedings because it was denied timely disclosure, an appropriate remedy can be fashioned by the Board, or by the court of appeals with jurisdiction of the petition for review or enforcement in the event the Board issues an order.⁹⁹⁴

Similarly, John Lennon was denied a motion for an order enjoining various officials of the Immigration and Naturalization Service (INS) from further proceedings regarding his deportation.⁹⁹⁵ He sought the disclosure of INS information and records while his appeal from a deportation order was pending before the Board of Immigration

990. 415 U.S. at 17.

991. 415 U.S. at 17-20.

992. 415 U.S. at 20.

993. *Sears, Roebuck & Co. v. NLRB*, 473 F.2d 91, 93 (D.C. Cir. 1972), *cert. denied*, 415 U.S. 950 (1974). *See also* *United Telephone Co. v. FCC*, 375 F. Supp. 992 (M.D. Pa. 1974).

994. 473 F.2d at 93 (footnote omitted).

995. *Lennon v. Richardson*, 378 F. Supp. 39 (1974).

Appeals. The court held that he had not demonstrated irreparable injury:

The information and records sought have been held to be irrelevant as a matter of law by the Immigration Judge. If that ruling is proper, there is no basis for an injunction to permit plaintiff to obtain these records to introduce in that proceeding. If it is improper, either the Board or the Court of Appeals may reverse with appropriate directions to the Immigration Judge to receive and consider such proof. Thus plaintiff will have his review and be protected against improper deportation during its course.⁹⁹⁶

d. *Expediting FOIA litigation.* Subsections (a)(4)(C) and (D) seek to expedite the litigation process in FOIA cases. Subsection (a)(4)(C) requires the defendant in an FOIA suit to plead to a complaint within thirty days after service of the complaint unless "the court otherwise directs for good cause shown."⁹⁹⁷ Subsection (a)(4)(D) tells the district courts and courts of appeals that "[e]xcept as to cases the court considers of greater importance, proceedings before the district court, as authorized by [subsection (a)(4)], and appeals therefrom, take precedence on the docket over all other cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."⁹⁹⁸

Subsection (a)(4)(C), enacted in 1974, supersedes, for the purposes of FOIA litigation, Federal Rule of Civil Procedure 12(a), which allows the United States sixty days to answer a complaint after it has been served.⁹⁹⁹ Federal Rule 6(b) allows time extensions at the discretion of the court "for cause shown" if such extensions are requested before the expiration of the original sixty-day period.¹⁰⁰⁰ The Department of Justice opposed shortening the sixty-day period because of the government's size and complexity:

The federal government is larger and more complex, and bears more crucial public interest responsibilities, than any other litigant. It needs more time to develop and check its positions, especially if they may affect agencies other than the one sued. And yet unlike a large corporation it cannot readily hire more lawyers to meet a sudden influx of litigation. A 20-day rule would increase the incidence of positions that would later be reformulated, causing unnecessary

996. 378 F. Supp. at 42 (footnotes omitted).

997. 5 U.S.C.A. § 552(a)(4)(C) (Supp. Feb. 1975).

998. 5 U.S.C.A. § 552(a)(4)(D) (Supp. Feb. 1975). The only significant difference between this provision and 5 U.S.C. § 552(a)(3) (1970) is the addition of the clause "and appeals therefrom" in the amended version.

999. "The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted." FED. R. CIV. P. 12(a).

1000. FED. R. CIV. P. 6(b)(1).

work for both sides and for the court, and providing ample illustrations of the adage that "haste makes waste."¹⁰⁰¹

The Justice Department also argued that, because cases filed outside Washington, D.C. would be handled by local United States Attorneys who might not be familiar with FOIA law, the sixty-day period was necessary to ensure adequate time for consultation with attorneys of the Civil Division of the Department of Justice who have substantial expertise in FOIA law.¹⁰⁰²

The persuasiveness of the Justice Department's position is materially weakened, however, upon consideration of the current practice of agency and Justice Department administrative coordination. In July 1973, the Justice Department effected a requirement that it be consulted before final agency denials: "No civil action against a federal agency under the Freedom of Information Act, 5 U.S.C. [§]552, shall be defended by the Civil Division, the Tax Division, or any other part of the Department of Justice unless the Department's Freedom of Information Committee has been consulted by the agency [before final agency denial]."¹⁰⁰³ Since the Justice Department must be consulted at the final agency-denial stage, the Department will have notice, prior to the filing of the complaint, of the documents that were withheld and the reasons for the withholding. Thus, since the legal questions raised by the agency's final denial will have been analyzed before the complaint is received, the government's legal position should be clear enough to permit responsive pleadings to be drafted within the time limit.

The thirty-day reduction in the time period for filing responsive pleadings probably will have only a minimal effect on litigation delays. For example, if it were assumed that the Government would always take thirty days to answer, reduction of less than fifteen per cent in total litigation time might be expected.¹⁰⁰⁴ The effect of the provision could be further minimized if courts liberally construe the "good cause shown" requirement for extensions of the thirty-day period. Under the sixty-day rule,¹⁰⁰⁵ extensions permitted by Federal

1001. 1973 *House Hearings*, *supra* note 756, at 124 (statement of R. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Department of Justice).

1002. *Id.* See also 4 1972 *House Hearings*, *supra* note 326, at 1195-96 (testimony of R. Erickson and R. Saloschin, Office of Legal Counsel, Department of Justice).

1003. 28 C.F.R. § 50.9(a) (1974). See note 956 *supra*.

1004. In a survey of 33 FOIA cases filed in the United States District Court for the District of Columbia from 1967 to 1971, the average number of days before a responsive pleading was filed was 68. Survey by William A. Dobrovir in 5 1972 *House Hearings*, *supra* note 326, at 1398 [hereinafter Dobrovir Survey]. If, under the amended FOIA, agencies waited an average of 30 days to file responsive pleadings, the reduction would be an average of 38 days per case, or considerably over 50 per cent. However, since the surveyed cases took an average of 294 days to decide, the reduction in total litigation time may be less than 15 per cent. *Id.*

1005. See text at note 999 *supra*.

Rule of Civil Procedure 6(b) "for cause shown" have been routinely granted. One survey of FOIA cases found that the average time before a responsive pleading is filed is sixty-eight days, and in five of the thirty-one cases considered responsive pleadings were not filed for over one hundred days.¹⁰⁰⁶ If the standards for time extensions contained in (a)(4)(C) and Rule 6(b) are similarly interpreted, extensions also will be frequently granted under the FOIA provision.

Subsection (a)(4)(D), the docket priority provision, may not be any more successful than the responsive pleading provision in eliminating litigation delays. This subsection was originally enacted as part of section 552(a)(3) of the 1967 FOIA. The 1974 amendments enlarged its scope to cover appeals as well as initial decisions, and renumbered it.¹⁰⁰⁷

One survey of FOIA litigation time has been conducted.¹⁰⁰⁸ It found that the average time for final judicial determinations of FOIA cases in the District Court for the District of Columbia is 294 days.¹⁰⁰⁹ The median time interval between filing and disposition for civil cases terminated in all federal district courts between July 1, 1972, and June 30, 1973, was 300 days.¹⁰¹⁰ For civil cases in which the United States was a party, the median time interval was 150 days.¹⁰¹¹ Due to their aggregate nature, drawing conclusions from a comparison of these statistics is fraught with hazards, but they do suggest that FOIA litigation is roughly as time consuming as other civil litigation. It is clear, however, that the courts are capable of acting with great dispatch in FOIA cases when they determine that prompt action is necessary. For example, at the trial level, *EPA v. Mink*¹⁰¹² was decided in 16 days.¹⁰¹³

Under subsection (a)(4)(D), appeals from FOIA cases also are to be expedited.¹⁰¹⁴ There is no data on the length of time FOIA courts have taken to decide appeals. Again, it is unlikely that the 1974 provision will be more effective in expediting appeals than was the original provision in expediting trials.¹⁰¹⁵

1006. See Dobrovir Survey, *supra* note 1004.

1007. See note 998 *supra*.

1008. See Dobrovir Survey, *supra* note 1004.

1009. *Id.*

1010. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 364 (1973) (Table C-5).

1011. *Id.* at 368 (Table C-5a).

1012. 410 U.S. 73 (1973) (dist. ct. opinion unreported).

1013. The complaint was filed on Aug. 11, 1971, and was answered on Aug. 23, 1971. The case was decided four days later on Aug. 27. See Dobrovir Survey, *supra* note 1004.

1014. See note 998 *supra*.

1015. Representative Moorhead offered the following assessment of the effectiveness of the statutory mandate contained in the original FOIA: "While the Freedom of Information Act instructs the courts to give priority to litigation brought under it,

The weakness of the priority provision lies, perhaps, in its generality. The courts are directed to hear FOIA cases before "all cases," "except as to cases the court considers of greater importance." Although the congressional policy of prompt resolution of FOIA disclosure suits is clear from the language of the provision, the provision's lack of specific standards allows courts to continue exercising their routine practices in ordering their dockets. If the mandate to expedite is to be effective, more specific directions on case priority will be necessary. Congress may have been reluctant to do this because it feared jeopardizing the separate integrity of the nation's judicial system by unduly interfering with its internal administration.

e. *Attorney fees.* Subsection 552(a)(4)(E) provides: "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."¹⁰¹⁶ The provision is designed both to encourage citizens to exercise their rights under the FOIA and to deter agencies from unnecessarily withholding information. Prior to the addition of this subsection in 1974, 28 U.S.C. § 2412 barred the federal courts from exercising their equitable discretion to award attorney fees in FOIA cases.¹⁰¹⁷

it is apparent that the speedy determination of suits for information access is not being fulfilled despite clear Congressional intent." 5 1972 *House Hearings*, *supra* note 326, at 1376.

1016. 5 U.S.C.A. § 552(a)(4)(E) (Supp. Feb. 1975).

1017. 28 U.S.C. § 2412 (1970) provides: "Except as otherwise specified by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity" Thus, in the absence of a specific statute to the contrary, attorney fees cannot be assessed against the United States. *See, e.g.,* *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 43 U.S.L.W. 4561, 4570 (U.S. May 12, 1975); *Pyramid Lakes Paiute Tribe of Indians v. Morton*, 499 F.2d 1095, 1096 (D.C. Cir. 1974); *Citizens Comm. for the Columbia River v. Callaway*, 494 F.2d 124, 126 (9th Cir. 1974); *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1332 (1st Cir. 1973); *Cassata v. Federal Sav. & Loan Ins. Corp.*, 445 F.2d 122, 125 (7th Cir. 1971). *See also* J. MOORE, *FEDERAL PRACTICE* ¶ 54.75[3.-2], at 1588 (2d ed. 1974). *But see* *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 43 U.S.L.W. 4561, 4576 n.9 (U.S. May 12, 1975) (Marshall, J., dissenting): "The statute, construed in light of the rule against implied restrictions on equity jurisdiction, may not foreclose attorneys' fee awards against the United States in all cases. Section 2412 states that the ordinary recoverable costs shall not include attorneys' fees; it may be read not to bar fee awards, over and above ordinary taxable costs, when equity demands." For a similar argument, see King & Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 TENN. L. REV. 27, 88 (1973).

Court costs, as provided in 28 U.S.C. § 1920 (1970), may be assessed against the United States pursuant to the express terms of 28 U.S.C. § 2412 (1970). FED. R. CIV. P. 54(d) states that costs ordinarily "shall be allowed as of course to the prevailing party," but limits the assessment of costs "against the United States, its officers and agencies . . . only to the extent permitted by law." It has been suggested that 28 U.S.C. § 2412 (1970) would not even permit attorneys' docket fees, as provided in 28 U.S.C. § 1923(a) (1970), to be awarded against the United States in the absence of a specific statute so providing. *See* 6 J. MOORE, *supra*, ¶ 54.75[3.-2], at 1558-59. However, the

Since the ultimate enforcement of the FOIA depends upon the initiation of litigation by persons whose information requests are denied, the ability to litigate, or to pose a credible litigation threat, is clearly essential to the full utilization of the rights conferred by the Act. Not all requesters seek information that is commercially valuable to them, however, and some may not be able to afford the costs of judicial review in the absence of some sort of attorney fee provision. FOIA litigation is expensive. It has been estimated that "[e]ven the simplest of freedom of information cases will incur legal expenses well in excess of \$1,000."¹⁰¹⁸ These costs are "hardly conducive to [litigation by] the private individual or public interest group that needs the information but will receive no financial gain as a result of obtaining it."¹⁰¹⁹ For example, the media, and most notably the newspapers, have been deterred from seeking judicial review of denied information requests by the expense of litigating FOIA suits.¹⁰²⁰ Private citizens, for the most part, have also been unable to bear the burden of litigation costs: "Litigation . . . is a luxury few citizens can afford."¹⁰²¹ Moreover, it has been suggested

Supreme Court in *Alyeska* recently indicated that attorney fees under section 1923 may be awarded against the United States. 43 U.S.L.W. at 4570.

The original FOIA included no provision permitting the award of attorney fees in FOIA cases. Although an early bill, S. 1666, 88th Cong., 1st Sess. (1963), which passed the Senate in 1964, 110 CONG. REC. 1708 (1964), contained a provision for the discretionary award of attorney fees against the United States in FOIA cases, no action was taken by the House on this bill. See Note, *supra* note 319, at 440.

1018. 1 1973 Senate Hearings, *supra* note 125, at 211 (testimony of R. Nader); 2 1973 Senate Hearings, *supra*, at 102 (testimony of H. Wellford, Center for the Study of Responsive Law). Similarly, one attorney estimated that the attorney fees in several FOIA cases he had litigated would have been "in the neighborhood of \$60,000 or \$70,000" if they had been calculated at the regular rates of a leading Washington law firm. *Id.* at 115 (statement of W. Dobrovir).

1019. 1 1973 Senate Hearings, *supra* note 125, at 211 (testimony of R. Nader).

1020. "An overriding factor in the failure of our segment of the Press to use the existing Act is the expense connected with litigating FOI matters in the courts once an agency has decided against making information available. This is probably the most undermining aspect of the existing law and severely limits the use of the FOI Act by all media, but especially smaller sized newspapers." 2 1973 Senate Hearings, *supra* note 125, at 34 (statement of National Newspaper Association). Cf. 1 1973 Senate Hearings, *supra*, at 170; 2 1973 Senate Hearings, *supra*, at 24.

1021. 2 1973 Senate Hearings, *supra* note 125, at 102 (testimony of H. Wellford, Center for the Study of Responsive Law). As one observer has stated: "Judicial review is more realistically available to agency clientele than to most researchers. There is usually a tangible benefit in compelling disclosure to a party in an agency proceeding. Hence, the possibility of court action by a disappointed member of an agency's clientele is far greater than that of action by a disappointed private citizen engaged in research." Koch, *supra* note 333, at 196. See also 2 1973 Senate Hearings, *supra*, at 42 (testimony of J. Shattuck, Staff Counsel, ACLU); Giannella, *supra* note 905, at 225.

Unfortunately, there is no recent data on the implementation of the FOIA with which to verify these observations. A 1972 Library of Congress Study, *supra* note 907, indicates that 640 of 1503 (43 per cent) final agency denials made between July 4, 1967, and July 4, 1971, were made to corporations and private law firms. *Id.* Of 40 lawsuits brought under the FOIA between July 1967 and March 1969, 37 (92

that, under the 1967 Act, agencies discriminated against those requesters who posed a weak litigation threat.¹⁰²² Those who could credibly threaten litigation, on the other hand, appeared to be more successful in obtaining disclosure. One requester, seeking information from the CAB, waited for a response for six months. He decided to litigate and three days after filing suit the information was hand-delivered to his office.¹⁰²³ One veteran of several FOIA suits has commented:

Often the mere threat of legal action makes information available which originally had been denied. The government's fear of being sued is understandable, because the courts, for the most part, have interpreted the Act liberally. Of 99 cases decided by the courts between 1967 and 1971, the government's refusal to release information was sustained in only 23 cases.¹⁰²⁴

Another result of the infrequency of litigation under the 1967 FOIA was that some agencies felt unconstrained by case law in their disclosure determinations. Thus, agencies have refused requests for documents identical in nature to those previously ordered released.¹⁰²⁵ Since few unsuccessful requesters could overcome the barrier of the high costs of a suit, agencies were able to deny information requests without risking court enforcement. Even if requesters did sue and win, agencies were not penalized for taking legally indefensible positions.

Subsection (a)(4)(E) was enacted to alleviate these problems. The provision, if invoked, makes it less costly for requesters to pursue successful judicial enforcement of the provisions of the FOIA and

per cent) involved actions by corporations or private parties seeking information relating to personal claims or benefits. Nader, *supra* note 333, at 13. These figures suggest that a large percentage of corporations and other private interests can afford to challenge agency denials.

1022. Such allegations are difficult to document. See Koch, *supra* note 333, at 196-97. An example of discriminatory information treatment is demonstrated by the difficulty that a Nader group had in obtaining disclosure of a CAB report on the causes and handling of customer complaints received by the airlines industry. The study had already been made available to the airlines. Disclosure "was denied on the specious reasoning that [the report] 'mentions names of airlines,' gives numbers of complaints received by some of the airlines and was compiled from the records of the airlines regulated by the CAB. In addition, [it was denied] *both* because 'secrecy was necessary to protect complainants from harassment and retaliation by the airlines,' and because the CAB feared that the findings might be competitively detrimental to the deficient airlines" Nader, *supra* note 333, at 13 (emphasis original).

1023. 5 1972 House Hearings, *supra* note 326, at 1414 (testimony of B. Kass).

1024. 2 1973 Senate Hearings, *supra* note 125, at 102 (testimony of H. Wellford, Center for the Study of Responsive Law).

1025. 1 1973 Senate Hearings, *supra* note 125, at 206-07 (testimony of R. Nader). Similar problems have arisen concerning FTC administration staff manuals, *id.*, and USDA correspondence and surveys. 2 1973 Senate Hearings, *supra*, at 62-63 (statement of P. Schuck, Consumers Union of United States, Inc.). See 120 CONG. REC. S9314 (daily ed. May 30, 1974) (statement of Senator Kennedy).

effectively penalizes agencies that have incorrectly refused to disclose requested information.¹⁰²⁶ This penalty, and the increased likelihood of judicial review, should deter agencies from arbitrarily denying requests.

There are three conditions to an award of "reasonable" attorney fees under (a)(4)(E):¹⁰²⁷ the attorneys' fees and costs have to be incurred in "any case under this section"; the complainant must "substantially" prevail; and the court must be convinced that the assessment of attorney fees is appropriate.

"[A]ny case under this section" refers to section 552 of the APA, the FOIA.¹⁰²⁸ Attorney fees may be awarded in cases reviewing the

1026. *But cf.* Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301, 334 (1973) (stating that the effect of an award of attorney fees against the government is to make the entire public share in the costs of the prevailing party's litigation).

1027. The fees awarded must also be "reasonable," but this requirement does not appear to pose significant problems. The ABA CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 2-106(B), lists several factors that should guide the court in its calculation of a "reasonable" fee, once it deems the award appropriate:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

Similar factors were applied in determining a fee award in *Kiser v. Miller*, 364 F. Supp. 1311 (D.D.C. 1973).

As Judge Skelly Wright has stated: "The first purpose of an award of fees is to make the client whole." *Wilderness Soc. v. Morton*, 495 F.2d 1026, 1037 (D.C. Cir. 1974), *rev'd on other grounds sub nom. Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 43 U.S.L.W. 4561 (U.S. May 12, 1975). Thus, where there is an agreement between attorney and client regarding fees, it would seem that this agreement should be the starting point in the calculation. It would probably contravene public policy to base an award on an "unreasonable" fee agreement, however.

See *Kiser v. Miller*, 364 F. Supp. 1311, 1319 (D.D.C. 1973). ("It is ingrained in the policy of determining reasonable attorney's fees, that an attorney is entitled to no more than a reasonable fee, no matter what fee is specified in the contract").

In some cases, the amount of the fee award need not be limited to the amount actually paid or owed the attorney. For example, in *Wilderness Society*, successful counsel were salaried employees of a public interest organization. The lower court's award was based on the market value, not the actual costs, of their services. 495 F.2d at 1037. See *Fairley v. Patterson*, 493 F.2d 598, 607 (5th Cir. 1974); *Clark v. American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), *aff'd.*, 437 F.2d 959 (5th Cir. 1971).

1028. The requirement of a "case under this section" should not be read to permit a fee award only in cases in which a final verdict is reached after trial. Under the common-fund doctrine, *see* text at notes 1046-50 *infra*, it is accepted that judgment after trial is not a prerequisite to a fee award, since such a requirement might discourage prompt settlements. 6 J. MOORE, *supra* note 1017, ¶ 54.77[2]. *See* *Levine v. Bradlee*, 378 F.2d 620 (3d Cir. 1967); *Gilson v. Chock Full O'Nuts Corp.*, 331 F.2d 107 (2d Cir. 1964); *Schechtman v. Wolfson*, 244 F.2d 537 (2d Cir. 1959); *Milstein v.*

agency's determination whether disclosure is warranted and in cases where a requester is seeking to enforce the time limit and fee mandates of (a)(4).¹⁰²⁹ However, cases that incidentally deal with the FOIA were probably not meant to be included in (a)(4)(E). For example, an agency employee "arbitrarily or capriciously" withholding information may be investigated and disciplined by the Civil Service Commission (CSC).¹⁰³⁰ If the employee seeks review of the CSC findings under section 706 of the APA, he should not be granted attorney fees if he prevails.¹⁰³¹

The plaintiff must "substantially prevail" if he is to recover attorney fees. The House bill would have permitted these fees to be assessed against the United States "in any case . . . in which the United States . . . has not prevailed."¹⁰³² The language of the current provision originated in the Senate bill.¹⁰³³ While the conference report noted the difference between the House and Senate provisions, it did not explain the significance of the language adopted.¹⁰³⁴ This language could be interpreted to require a court to consider the number of documents ordered disclosed relative to the number of records sought by the plaintiff. However, since many different types of records that could be requested under the Act are not capable of direct comparison in this way, no clear definition of "substantially prevailed" would emerge. The language could also be interpreted to require a substantial legal victory for the plaintiff, or a lack of any reasonable support for the government's position.

Because the "substantially prevailed" language is ambiguous, courts may adopt the standards used for awarding attorney fees in other substantive areas of the law. In *Natural Resources Defense*

Werner, 58 F.R.D. 544 (S.D.N.Y. 1973); *Globus, Inc. v. Jaroff*, 279 F. Supp. 807 (S.D.N.Y. 1968). Indeed, one party's failure to accept a reasonable settlement offer may be evidence of bad faith, justifying a fee award on the basis of the "obdurate behavior" rationale. See *De Thomas v. Delta S.S. Lines, Inc.*, 58 F.R.D. 335, 345-46 (D.P.R. 1973); text at notes 1041-45 *infra*.

1029. Subsection 552(a)(6)(C) permits requesters to bring suit after the expiration of the time limits for agency action. Such a suit would clearly be a "case under this section," since section 552 specifically provides for the cause of action. Similarly, where a requester seeks review of the fees applied to his request, he is also seeking an "order [for] production of agency records improperly withheld." 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975). See *Diapulse Corp. v. FDA*, 500 F.2d 75 (2d Cir. 1974).

1030. 5 U.S.C.A. § 552(a)(4)(F) (Supp. Feb. 1975). See text at notes 1072-97 *infra*.

1031. In such a case, the employee's cause of action arises under 5 U.S.C. § 706 (1970) and not under any provision of the FOIA. It is unclear whether attorney fees may be awarded in "reverse FOIA" suits. Some courts have found that these suits are based on the FOIA, while others have found jurisdiction under other parts of the APA. See note 1137 *infra*.

1032. H.R. 12471, 93d Cong., 2d Sess. § 1(c) (1974).

1033. See S. 2543, 93d Cong., 2d Sess. § 1(b)(2) (1974).

1034. See CONFERENCE REPORT, *supra* note 225, at 9-10.

Council, Inc. v. EPA,¹⁰³⁵ for example, several issues were decided against the plaintiff yet an award of fees was made:

Were we to believe that the litigation were wholly or in substantial part frivolous, we would not, of course, award costs of any description to petitioners. In such cases, indeed, we reserve the right to award costs and fees in favor of the EPA. But the challenges here, even those not sustained, were mainly constructive and reasonable. And petitioners were successful in several major respects; they should not be penalized for having also advanced some points of lesser weight.¹⁰³⁶

The court thus considered only the reasonableness of the plaintiff's litigation posture in deciding whether the award of fees was warranted.¹⁰³⁷ Under such an interpretation, a plaintiff's success on one major issue in an FOIA case, even if several issues were in question, may justify an award of attorney fees.¹⁰³⁸

The final and most amorphous condition is that an award of attorney fees and litigation costs must be an appropriate exercise of the court's discretion. The subsection does not make the award mandatory; it provides only that "the court may assess . . ."¹⁰³⁹ The conference report refused to delineate guidelines for the exercise of this discretion, despite the fact that the Senate bill enumerated several factors: "[T]he conferees believe that because the existing body of law on the award of attorney fees recognizes such factors, a statement of the criteria may be too delimiting and is unnecessary."¹⁰⁴⁰ Thus, the "existing body of law," that is, the common law

1035. 484 F.2d 1331 (1st Cir. 1973).

1036. 484 F.2d at 1338. Similarly, the court in *Wilderness Soc. v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974), *rev'd on other grounds sub nom. Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 43 U.S.L.W. 4561 (U.S. May 12, 1975), did not think that the fact that the plaintiffs' action was mooted by legislation declaring the NEPA impact statement to be sufficient, should bar the award of attorney fees: "The advancement of important legislative policy justifying an award of attorneys' fees can be accomplished even where the plaintiff does not obtain the ultimate relief sought by the filing and prosecution of his suit." 495 F.2d at 1034.

1037. 484 F.2d at 1338.

1038. See Comment, *Balancing the Equities in Attorney's Fees Awards: Losing Plaintiffs and Private Defendants*, 62 GEO. L.J. 1439, 1452-53 (1974).

1039. 5 U.S.C.A. § 552(a)(4)(E) (Supp. Feb. 1975). A number of other federal statutes include similar, discretionary, attorney fee provisions. *E.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1970); Noise Control Act of 1972, 42 U.S.C. § 4911(d) (Supp. III, 1973). Other federal acts make the award of attorney fees to a prevailing party mandatory. *E.g.*, Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970); Truth-in-Lending Act, 15 U.S.C. § 1640(a)(2) (1970). As the Supreme Court recently stated: "[I]t is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 43 U.S.L.W. 4561, 4568 (U.S. May 12, 1975) (footnote omitted).

1040. CONFERENCE REPORT, *supra* note 225, at 10. The Senate bill provided: "In

defining the equitable powers of the courts to award attorney fees, is intended to guide awards in FOIA cases.

One situation in which attorney fees have been awarded under current equity practice is when the losing party acts in bad faith.¹⁰⁴¹ Here, the rationale of the award is punitive, so that "the essential element in triggering the award of fees is . . . the existence of 'bad faith' on the part of the unsuccessful litigant."¹⁰⁴² One court¹⁰⁴³ has spoken of a corollary to the "obdurate behavior" rule that applies to a defendant whose unfounded resistance to a suit results in unnecessary litigation: "When a suit alleging violation of clearly established law in a particular area is filed, and the defendants, in the face of evident violation of this law, persist in forcing the plaintiffs to expend efforts in preparing and/or conducting a trial, then attorneys' fees may appropriately be awarded."¹⁰⁴⁴ An unfounded agency denial of an FOIA request may result in just this sort of "unnecessary" litigation. Thus, the existence of bad faith on the part of an agency resisting an FOIA request may, without more, justify an award of attorney fees for the successful plaintiff.¹⁰⁴⁵

The "common fund" rationale also provides a basis in current equity practice for the award of attorney fees.¹⁰⁴⁶ In a case where the plaintiff's suit results in the creation of a common fund for members of an ascertainable class, a court may award the plaintiff attorney fees out of this fund so that the costs of the litigation will be appor-

exercising its discretion under this paragraph, the court shall consider the benefit to the public, if any, deriving from the case, the commercial benefit to the complainant and the nature of his interest in the records sought, and whether the Government's withholding of the records sought had a reasonable basis in law." S. 2543, 93d Cong., 2d Sess. § 1(b)(2) (1974).

1041. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 43 U.S.L.W. 4561, 4567 (U.S. May 12, 1975); *Hall v. Cole*, 412 U.S. 1, 5 (1973) ("[I]t is unquestioned that a federal court [in the exercise of its equitable powers] may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons,'" quoting 6 J. MOORE, *supra* note 1017, at 1709).

1042. *Hall v. Cole*, 412 U.S. 1, 5 (1973).

1043. *Fairley v. Patterson*, 493 F.2d 598, 606 (5th Cir. 1974).

1044. 493 F.2d at 606. While this doctrine originated as an exercise of the court's equitable power to award fees, the policies underlying the doctrine have been considered by a court in awarding fees pursuant to a statute. In *United States v. Gray*, 319 F. Supp. 871 (D.R.I. 1970), the government had brought a "pattern and practice" discrimination suit under title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-5 (1970). The court found the government's case to be without merit, and, exercising its discretion under section 2000a-3(b), assessed fees against the United States, stating, "the policy behind the award of counsel fees in § 2000a-5 cases . . . is that of discouraging the government from bringing meritless cases." 319 F. Supp. at 872.

1045. The Senate report indicates that private interests might recover attorney fees merely because a withholding was without a reasonable basis in law. See S. REP. NO. 93-854, *supra* note 329, at 19-20.

1046. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 43 U.S.L.W. 4561, 4567 (U.S. May 12, 1975).

tioned among its beneficiaries.¹⁰⁴⁷ While the doctrine originally required a monetary fund, it has been expanded to include cases where nonmonetary benefits accrue to large numbers of people.¹⁰⁴⁸ This doctrine appears to have limited applicability to FOIA cases, however. Even where the requested information benefits the public generally, the class of beneficiaries is difficult to define with accuracy, and the benefits are often diffuse.¹⁰⁴⁹ In similar cases of amorphous benefits, the courts have been reluctant to apply this doctrine. One court has stated:

[I]t has become exceedingly difficult to trace the benefits of litigation to their ultimate beneficiaries, so as to apportion attorneys' fees amongst them. Because of the attendant difficulties in determining the ultimate beneficiaries, the "common fund" mold simply does not fit the present situation. As Judge Merhige stated in *Bradley v. School Board of the City of Richmond, Virginia*, 53 F.R.D. 28, 35 (E.D. Va. 1971), wherein he rejected the common fund theory as a basis for awarding attorneys' fees in a school desegregation case: "School desegregation cases, or any suits against governmental bodies, do not fit this fund model without considerable cutting and trimming."¹⁰⁵⁰

1047. See, e.g., *Sprague v. Ticonic Natl. Bank*, 307 U.S. 161 (1939). See also *Falcon, Award of Attorneys' Fees in Civil Rights and Constitutional Litigation*, 33 *Mb. L. Rev.* 379; 402-07 (1973); King & Plater, *supra* note 1017, at 43-48.

1048. In *Mills v. Electric Auto-Lite*, 396 U.S. 375 (1970), a stockholder challenged a merger on the ground that misleading proxy solicitations had been distributed in violation of section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1970). The Court held that it was not necessary that the common benefit procured by the plaintiff's suit be a pecuniary benefit:

The dissemination of misleading proxy solicitations was a deceit practiced on the stockholders as a group . . . and the expenses of petitioners' lawsuit have been incurred for the benefit of the corporation and the other shareholders.

The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this [common fund] rationale

. . . . [A] corporation may receive a "substantial benefit" from a derivative suit, justifying an award of counsel fees, regardless of whether the benefit is pecuniary in nature.
396 U.S. at 392-95.

In *Callahan v. Wallace*, 466 F.2d 59 (5th Cir. 1972), the plaintiffs sought the return of over \$1,000,000 in traffic fines, collected under a state system that was held to be unconstitutional by the district court. The Fifth Circuit affirmed the district court's refusal to grant the refund; thus, no fund was created. However, the court reversed the denial of attorney fees and remanded for a determination of the appropriate award: "It is unquestionable that plaintiffs' attorneys rendered a public service . . . by laying to rest the confusion that had existed, and by bringing to an end the improper practice." 466 F.2d at 62.

1049. There is, of course, little possibility that a pecuniary benefit will accrue to other class members in FOIA suits.

1050. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 97 (N.D. Cal. 1972), *affd.*, 488 F.2d 559 (9th Cir. 1973) (footnote omitted). In this case, the court stated that it could not award attorney fees under the common-fund theory, 57 F.R.D. at 97, but it pro-

A more recently created development in the attorney fee area, which draws on both the bad faith and common fund doctrines, is the "private attorney general" rationale. This rationale is largely the product of case law developing under the attorney fees provision of the Civil Rights Act of 1964.¹⁰⁵¹ In *Newman v. Piggie Park Enterprises, Inc.*,¹⁰⁵² the Supreme Court stated:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.¹⁰⁵³

The Civil Rights Act of 1964 and the FOIA are similar in that both rely on private litigation as an enforcement mechanism, and both allow no damage awards to be granted in such enforcement suits. The successful FOIA plaintiff, like the successful Civil Rights Act plaintiff, is effectuating a strong congressional policy.¹⁰⁵⁴ Attorney fees are awarded under the Civil Rights Act to encourage aggrieved parties to litigate¹⁰⁵⁵ and to discourage United States Attorneys from litigating meritless suits.¹⁰⁵⁶ Similar concerns motivated Congress to amend the FOIA in 1974 to allow the assessment of attorney fees against the government.¹⁰⁵⁷ Accordingly, the "private attorney general" rationale behind the award of attorney fees in

ceeded to make such an award under the private attorney-general rationale, discussed *infra* at note 1051. 57 F.R.D. 98-101.

1051. 42 U.S.C. § 2000a-3(b) (1970).

1052. 390 U.S. 400 (1968).

1053. 390 U.S. at 401-02 (footnotes omitted).

1054. "Generally, if a complainant has been successful in proving that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating an important public policy." S. REP. NO. 93-854, *supra* note 329, at 19.

1055. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968).

1056. *United States v. Gray*, 319 F. Supp. 871, 872 (D.R.I. 1970). See note 1044 *supra*.

1057. See text at notes 1016-26 *supra*.

civil rights suits should also justify the award of attorney fees in FOIA cases where the plaintiff's suit vindicates the public interest.¹⁰⁵⁸ The *Newman* doctrine, which allows a successful plaintiff to recover attorney fees "unless special circumstances render such an award unjust,"¹⁰⁵⁹ should guide courts in awarding fees in these FOIA suits. The "special circumstances" that justify a refusal to award attorney fees under the *Newman* doctrine have been narrowly construed.¹⁰⁶⁰

This existing body of case law suggests that the courts should look primarily at three factors in determining whether an award of attorney fees would be an appropriate exercise of discretion:¹⁰⁶¹ the significance and degree of public benefit afforded by the plaintiff's success,¹⁰⁶² the reasonableness of the government's litigation posture,¹⁰⁶³ and the commercial motive of the plaintiff.¹⁰⁶⁴ In light of the

1058. In discussing the criteria specified in the Senate bill, *quoted* in the text at note 1040 *supra*, the Senate Judiciary Committee specifically referred to the "private attorney general" rationale. See S. REP. NO. 93-854, *supra* note 329, at 19-20.

1059. See text at note 1053 *supra*.

1060. In *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970), the court rejected the defendant's contention that, because he raised no frivolous defenses or issues and put forward his contentions in good faith and because several judges had agreed with him along the way, special circumstances were present. 426 F.2d at 538. In *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), *affd. per curiam*, 409 U.S. 942 (1972), a reapportionment case, the court awarded the plaintiff attorney fees, stating that once a plaintiff came within the definition of a "private attorney general," "the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits . . . and to carry out congressional policy." 340 F. Supp. at 694. In *Northcross v. Board of Educ.*, 412 U.S. 427 (1973), the Supreme Court, construing the attorney fees provision of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (Supp. III, 1972), which provides that the court "in its discretion . . . may allow the prevailing party . . . a reasonable attorneys fee as part of the costs," held that "if [the] other requirements of § 718 are satisfied, the successful plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" 412 U.S. at 428, *quoting Newman*, 390 U.S. at 402. See Nussbaum, *supra* note 1026, at 322-23.

1061. These factors are similar to those enumerated in the Senate bill. See S. 2543, 93d Cong., 2d Sess. § 1(b)(2) (1974), *quoted* in the text at note 1040 *supra*.

1062. See text at notes 1046-60 *supra*.

1063. See text at notes 1041-45 *supra*.

1064. In cases where there is a pecuniary benefit to the requester, the incentive to litigate provided by an award of attorney fees is not necessary. See text at notes 1018-21 *supra*.

Senator Kennedy and Representative Moorhead, chairpersons of the Senate and House conferees respectively, stated in a letter to President Ford:

You expressed concern that the amendments to the Freedom of Information Law authorizing the Federal courts to award attorney fees and litigation costs not be used to subsidize corporate interests who use the law to enhance their own competitive position.

The members of the conference committee completely share your concern in this connection, and the Statement of Managers will reflect [sic] mutual view that any award of fees and costs by the courts should not be automatic but should be based on presently prevailing judicial standards, such as the general public benefit

legislative history of (a)(4)(E), emphasizing the need to encourage requesters to exercise their right to judicial enforcement, and the case law in the civil rights area, courts should be liberal in awarding fees to successful plaintiffs.

Difficulty in applying these factors will arise when some of them justify an award of attorney fees and others do not. Perhaps the paradigm of a conflict in policies is the case in which a private corporation sues for information that is commercially valuable to it, but that also benefits the public in some way (even if only in the attenuated form of creating "good" FOIA precedent). Here the presence of a public benefit weighs in favor of the fee award. But, since the information is commercially valuable, there is apparently no need for the award as an incentive to enforce FOIA rights.

It can be argued that fees should be awarded regardless of the commercial benefit to the plaintiff, since the assessment of fees is justified by the value of deterring agencies from taking untenable legal positions.¹⁰⁶⁵ One FOIA plaintiff's lawyer suggested that such awards would come to the attention of the General Accounting Office (GAO):

[I]f [the GAO] discover[s] that the executive branch is suddenly spending a lot of money on attorneys' fees for cases they are losing, they will promptly conduct an investigation of the implementation of this act and report it to Congress. I think really the watchdog effect of the GAO on the amount of money that the Government is required to pay in attorneys' fees for cases they lose might be the most important part, have the most salutary effect from authorizing the courts to award attorneys' fees¹⁰⁶⁶

The Justice Department, on the other hand, does not believe that awards of attorney fees will significantly deter agency misconduct and would limit such awards:

We agree that the awarding of attorney's fees might in theory be of limited help in discouraging some agencies from litigating weak or marginal cases where information has been refused, but we do not believe it would have a significant effect. The usual reasons for

arising from the release of the information sought, as opposed to a more narrow commercial benefit solely to the private litigant.
120 CONG. REC. H10,003 (daily ed. Oct. 7, 1974).

1065. See 2 1973 Senate Hearings, *supra* note 125, at 102 (testimony of H. Wellford, Center for the Study of Responsive Law), 109 (statement of R. Ackerly), 211 (testimony of R. Nader). It can be argued that Congress' failure to provide for the assessment of attorney fees against individual agency appropriations demonstrates its intent not to employ such an award as a deterrent. However, in light of Congress' approval of the essentially punitive "bad faith" standard, *see* note 1040 *supra* and accompanying text, it seems more reasonable to conclude that Congress did intend to deter unreasonable denials by the award of attorney fees.

1066. *Id.* at 109 (statement of R. Ackerly).

litigating weak or marginal cases are that the agency thinks its policy or legal position is stronger than may appear to others, that the agency believes it will be criticized by a portion of the public or within Congress if it voluntarily releases the information, that the agency considers itself morally obligated to protect third persons or its own employees, or that the agency seeks the guidance of a court decision as to its obligations and options in circumstances of the type involved in the case. To the extent that an agency might decide to release information to avoid the risk of an award of attorney's fees, there is no assurance that such a disclosure would not be at the expense of some legitimate private interest such as individual privacy.¹⁰⁶⁷

It also might be argued that since an award of attorney fees is assessed from the United States Treasury and not from individual agency accounts,¹⁰⁶⁸ it would not provide an economic deterrent.¹⁰⁶⁹

The ultimate decision will lie with the courts and will in all probability turn on how they weigh the conflicting policies.¹⁰⁷⁰ For example, a media plaintiff derives some "commercial" benefit from the information it uncovers, but there is also a significant public educational benefit from the publication of government decisions and processes. Since one of the purposes of the 1974 amendment was to encourage greater use of the FOIA by the press, fees will probably be awarded in these cases.¹⁰⁷¹

1067. 1973 *House Hearings*, *supra* note 756, at 174 (letter from Department of Justice).

1068. 5 U.S.C.A. § 552(a)(4)(E) (Supp. Feb. 1975) provides that the court "may assess against the United States" and says nothing about assessments against the individual agencies.

1069. See 1973 *House Hearings*, *supra* note 756, at 278-79 (statement of A. Scalia, Chairman, Administrative Conference of the United States) ("That the provision will be a disincentive to agency refusals seems doubtful, because the money will come from general Government funds rather than the agency's appropriation. Even if it came from the agency's budget, the impact on the officer making the decision not to disclose would be remote"); Clark, *supra* note 911, at 766-67. Cf. note 1026 *supra*.

1070. It is also possible that courts will decide to ignore the public benefit and pecuniary factors and apply only a "bad faith" test in awarding fees, in order to avoid an anomalous result under the new disciplinary provision, 5 U.S.C.A. § 552(a)(4)(F) (Supp. Feb. 1975), discussed in the text at notes 1072-97 *infra*. That provision is triggered by the award of "reasonable attorney fees and other litigation costs." See text at note 1072 *infra*. It does not seem reasonable to interpret the Act to allow one agency employee to deny arbitrarily the request of a private-interest requester (for information that does not benefit the public or that results in pecuniary benefit to the requester) and be free from any disciplinary action, while subjecting another to such disciplinary action if he denies the same information to a public-interest group.

1071. The Senate Committee on the Judiciary, in commenting on how the criteria contained in the Senate bill should be applied, *see* note 1040 *supra*, stated that "a court would ordinarily award fees . . . where a newsman was seeking information to be used in a publication . . ." and that "for the purposes of applying [the criterion of 'commercial benefit to the plaintiff'], news interests should not be considered commercial interests." S. REP. NO. 93-854, *supra* note 329, at 19. See generally 4 1972 *House Hearings*, *supra* note 326, at 1279-332.

f. *CSC proceedings.* The 1974 FOIA amendments added subsection (a)(4)(F), which provides the threat of a punitive sanction for agency officials who have flagrantly violated the Act's disclosure mandates. It states:

Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.¹⁰⁷²

The provision was the product of a conference committee compromise: The House bill did not include agency employee sanctions,¹⁰⁷³ and the Senate bill included a sanction provision authorizing the court, upon finding that the withholding was without a reasonable basis in law, to suspend the responsible officer or employee for up to sixty days or take other "appropriate disciplinary or corrective action against him."¹⁰⁷⁴

The subsection represents a relatively new disciplinary technique in federal administrative law.¹⁰⁷⁵ It provides for a CSC investigation

1072. 5 U.S.C.A. § 552(a)(4)(F) (Supp. Feb. 1975).

1073. See H.R. 12471, 93d Cong., 2d Sess. (1974).

1074. S. 2543, 93d Cong., 2d Sess. § 1(b)(2) (1974) provided:

Whenever records are ordered by the court to be made available under this section, the court shall on motion by the complainant find whether the withholding of such records was without reasonable basis in law and which Federal officer or employee was responsible for the withholding. Before such findings are made, any officers or employees named in the complainant's motion shall be personally served a copy of such motion and shall have 20 days in which to respond thereto, and shall be afforded an opportunity to be heard by the court. If such findings are made, the court shall, upon consideration of the recommendation of the agency, direct that an appropriate official of the agency which employs such responsible officer or employee suspend such officer or employee without pay for a period of not more than 60 days or take other appropriate disciplinary or corrective action against him.

See CONFERENCE REPORT, *supra* note 225, at 10; S. REP. No. 93-854, *supra* note 329, at 21-23. See also 120 CONG. REC. H10,001-02 (daily ed. Oct. 7, 1974) (statement of Representative Moorhead).

1075. Cf. 5 C.F.R. §§ 735.206, .303 (1974) (CSC Regulations prohibiting the use of official information in furtherance of private purposes when such information has not been made available to the general public).

A number of states have included disciplinary sanctions provisions in their open-records laws. See S. REP. No. 93-854, *supra* note 329, at 63-64; notes 1296-302 *infra* and accompanying text.

to be triggered by the award of attorney fees to the plaintiff and by a written judicial finding that questions of arbitrary and capricious action by government employees were raised. The CSC must then initiate a proceeding to determine whether disciplinary action is warranted.¹⁰⁷⁶ While the subsection is far from clear on this matter,¹⁰⁷⁷ it was probably contemplated that the CSC "proceeding" be undertaken pursuant to the procedures of the CSC presently in effect regarding disciplinary proceedings.¹⁰⁷⁸ Under those proceedings, disciplinary sanctions may be imposed "only for such cause as will promote the efficiency of the service."¹⁰⁷⁹

The subsection was intended to affect the motivation of the individual agency officials who must implement the disclosure provi-

1076. See CONFERENCE REPORT, *supra* note 225, at 10; 120 CONG. REC. H10,001-02 (daily ed. Oct. 7, 1974) (statement of Representative Moorhead).

1077. Representative Erlenborn, one of the conferees, stated: "I asked the principal sponsor of the Senate provision, Senator Kennedy of Massachusetts, what a proceeding was. He was unable in conference to define it. It is neither defined in the Civil Service law, nor is it defined in the Freedom of Information Act. What kind of proceeding is intended by the compromise of the conferees is really rather vague." 120 CONG. REC. H10,006 (daily ed. Oct. 7, 1974). Neither the language of the amendment nor the conference report clarify what type of "proceeding" was intended.

1078. Representative Moorhead stated: "The Civil Service Commission would then investigate the circumstances, may hold hearings, and otherwise proceed in accordance with regular civil service procedures." 120 CONG. REC. H10,001-02 (daily ed. Oct. 7, 1974).

The present CSC regulations provide for the hearing of appeals from disciplinary actions taken by agencies against their employees. In considering those appeals, the CSC may make its own investigation and hold evidentiary hearings. 5 C.F.R. §§ 772.301-.308 (1974). The regulations also permit the CSC to initiate actions, but only against employees in the competitive service and only with regard to employees "appointed subject to investigation under [5 C.F.R.] § 731.301 [of their qualifications and suitability for employment]. . . ." 5 C.F.R. § 754.101 (1974). While either the appellate procedures or the initiating procedures may be adaptable to the proceedings mandated by the FOIA amendments, the latter already include specific procedural safeguards and therefore seem preferable. They require that the employee (1) must receive at least 30 days advance notice of the proposed disciplinary action, 5 C.F.R. § 754.102 (1974); (2) "may answer the charges either orally in person, or in writing, or both" within 15 days of the notice, 5 C.F.R. § 754.103 (1974); (3) must be notified of the agency decision and informed of his appeal rights, 5 C.F.R. § 754.104 (1974); and (4) "may appeal an adverse decision" within fifteen days. 5 C.F.R. § 754.105 (1974). See generally Berzak, *Rights Accorded Federal Employees Against Whom Adverse Personnel Actions Are Taken*, 47 NOTRE DAME LAW. 853 (1972); Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196 (1973).

1079. 5 U.S.C. § 7501 (1970). This provision applies only to those in the competitive service and was enacted to protect federal employees from arbitrary personnel actions. Berzak, *supra* note 1078, at 853-54, 860-61. There is some question as to whether this standard would be applicable to FOIA disciplinary proceedings or whether the CSC would merely investigate the facts surrounding the withholding to determine whether the employee's action was arbitrary and capricious. In view of the CSC's expertise in personnel management, the fact that Congress provided no guidance of what an appropriate sanction might be, and the lack of a clear repudiation of the "efficiency of the service" standard, it can be argued that Congress intended to adopt the existing CSC procedures with no substantive modifications, deferring to the CSC's discretion in determining whether disciplinary action is warranted.

sions of the FOIA.¹⁰⁸⁰ Attorney General Ramsey Clark predicted in 1967 that the effectiveness of the Act would ultimately depend on the attitudes of those who administer it:

No review of an area as diverse and intricate as this one can anticipate all possible points of strain or difficulty. This is particularly true when vital and deeply held commitments in our democratic system, such as privacy and the right to know, inevitably impinge one against another. Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government.¹⁰⁸¹

Before the enactment of the 1974 FOIA amendments, agency officials were encouraged to refuse disclosure in potentially troublesome cases by a federal statute imposing criminal penalties for the general disclosure of confidential information,¹⁰⁸² and by the threat of suits brought by private parties to protect from disclosure documents held by government agencies.¹⁰⁸³ In 1973, one commentator stated: "[U]nder the Freedom of Information Act as it appears to work now the reflex of the official, if he has any doubts at all, is to deny information. That seems to keep him out of trouble—rather than to act under the Freedom of Information Act and to grant informa-

1080. Senator Kennedy gave this account of the Senate's purpose in providing for disciplinary sanctions:

Former Attorney General Richardson observed in our hearings that—

"The problem in affording the public more access to official information is not statutory but administrative."

He indicated that—

"The real need is not to revise the act extensively but to improve compliance."

That is precisely why we included this sanction in S. 2543.

There are three problems to which this new accountability provision addresses itself: where officials refuse to follow clear precedent, forcing a requester to go to court despite the clarity of the disclosure requirement in the specific case; where officials deny requests without bothering to inform themselves of the mandates of the law; and where obstinacy provides the obvious basis for the official's refusal to disclose information.

120 CONG. REC. 59314 (daily ed. May 30, 1974).

1081. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at III.

1082. 18 U.S.C. § 1905 (1970) provides:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

Cf. text at notes 573-80 *supra*.

1083. See text at notes 1132-67 *infra*.

tion."¹⁰⁸⁴ For example, consider the plight of Rudy Frank, an OEO employee. He was suspended by the OEO for releasing the salaries of teachers at a day-care center operated by a private corporation under contract with the OEO. Frank successfully argued in court that the FOIA required the release of the records, but the CSC persisted in resisting Frank's claim for back pay.¹⁰⁸⁵

Although the practical effect of subsection (a)(4)(F) remains to be seen, it is doubtful that the provision will significantly encourage disclosure. There are several problems with the provision. First, it does not clearly establish a standard of conduct the violation of which will be penalized.¹⁰⁸⁶ The exemptions to the FOIA are broad and complex; their implementation must depend in large part on administrative discretion. Allowing courts that find that a case raises questions of arbitrary and capricious action to submit officials to a CSC judgment on the promotion of "the efficiency of the service"¹⁰⁸⁷ makes the disciplinary process highly discretionary.

Second, it may be difficult to determine who is "primarily responsible for the withholding" and therefore subject to the subsection's procedures.¹⁰⁸⁸ Under the FOI procedures of most agencies, a requester must appeal the agency's initial decision to withhold materials within the agency before he may seek judicial review.¹⁰⁸⁹ The agency's decision at the agency appeal level usually includes consultation with the Department of Justice's FOI Committee.¹⁰⁹⁰ Thus, responsibility for the disclosure decision will usually have passed from the official making the initial determination to those at the higher levels of the agency who decide the appeal.¹⁰⁹¹ Does the provi-

1084. Interagency Symposium, *supra* note 913, at 28 (statement of F. Graham, CBS News).

1085. See 1 1973 Senate Hearings, *supra* note 125, at 209 (statement of H. Wellford, Center for the Study of Responsive Law); 2 1973 Senate Hearings, *supra*, at 105 (testimony of R. Nader).

1086. It could be argued that this failure to provide an adequate standard would deny an employee subjected to disciplinary measures due process of law. However, in *Arnett v. Kennedy*, 416 U.S. 134 (1974), a plurality of the Court rejected the argument that the standard of 5 U.S.C. § 7501 (1970) ("such cause as will promote the efficiency of the service") was unconstitutionally vague in failing to provide sufficiently precise guidelines as to which kinds of speech could be the basis for adverse actions. 416 U.S. at 163-64.

1087. See text at note 1079 *supra*.

1088. As a starting point in determining which official was "primarily responsible," the amendments require: "Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request." 5 U.S.C.A. § 552(a)(6)(C) (Supp. Feb. 1975).

1089. See text at notes 955-56 *supra*.

1090. See text at note 1003 *supra*.

1091. Representative Erlenborn, one of the conferees, stated:

As a matter of fact, the provision that is now in the bill is one that, in my

sion still allow the disciplining of lower level officials if internal agency appeals have been made or are only the final decision makers "primarily responsible"? The result of the confusion may be simply that the sanction provision will rarely be invoked.¹⁰⁹²

Third, the CSC traditionally has not encouraged agency officials to disclose FOIA information.¹⁰⁹³ One disgruntled newspaperman stated that "[t]here is no more outrageous agency in the city from the standpoint of coverup than the Civil Service Commission."¹⁰⁹⁴ Since the CSC is a vital link in the disciplinary mechanism, its reluctance to encourage compliance with the FOIA may serve to nullify the corrective strength of the sanction.

Finally, assuming that the sanction is perceived by agency officials as significant and that it is clear enough to encourage those officials to handle properly their tasks of disclosure, imposing the sanction may cause undesirable organizational consequences. For example, if sanctions are applied to low level officials, it may cause them to refuse to exercise their discretion: "[L]ow level officials . . . simply . . . won't make a decision. They will consult their superiors. And you will find that the amount of initiative and informed discretion which you can expect at the lower and middle levels of the bureaucracy, the people who are really going to make or break this program, will progressively lessen as they are whipsawed between mandatory time limits and the possibilities of civil penalties."¹⁰⁹⁵ As a result, centralization and formalization of the FOIA agency decision-making process will be encouraged, adding time and red tape to disclosure decisions. A Commerce Department official noted that "the idea of having penalties attached to the quality of the decision that is made

judgment, could never result in the imposition of a sanction against a Federal employee.

. . . As a matter of fact, before the case ever gets to court, the employee who refuses to give information when a demand is made will have to have been supported by his superior. There will have had to have been an administrative appeal within the agency.

In most agencies this would mean that the general counsel of the agency would support the decision of the employee, and then the case would have to be brought to court by the one who was seeking the information. The Attorney General or the general counsel of the agency would then have to make a decision at that point that the case is sufficiently meritorious to defend. Then possibly the court might find the agency to be wrong, but I think in that circumstance the court could hardly find that the employee who has been sustained all the way along the line had acted arbitrarily or capriciously.

120 CONG. REC. H10,006 (daily ed. Oct. 7, 1974).

1092. Thus, Representative Moorehead said: "I seriously doubt that such procedures will actually be invoked except in unusual circumstances." 120 CONG. REC. H10,002 (daily ed. Oct. 7, 1974).

1093. See, e.g., text at note 1085 *supra* (discussing the CSC's position in the *Frank* case).

1094. 1973 *House Hearings*, *supra* note 756, at 42 (statement of C. Mollenhoff, Washington Bureau Chief, Des Moines Register).

1095. Interagency Symposium, *supra* note 913, at 126-27 (statement of R. Berg, Executive Secretary, Administrative Conference of the United States).

is going to counteract any pressure towards decentralizing the decision-making process in the hope that . . . a decision will be made faster and the public interest will be served."¹⁰⁹⁶

If sanctions are applied to the high level officials who handle administrative appeals or establish agency procedures and guidelines for disclosure, other problems could result. Because such officials have many responsibilities, they may be unable to consider carefully each request; thus, their approval may amount to no more than a "rubber stamp." The CSC may find it inequitable to apply disciplinary sanctions to persons in this position. There is also some question whether present CSC procedures reach such officials.¹⁰⁹⁷

Although Congress' intent in enacting subsection (a)(4)(F) was salutary, the practical effect of the provision will undoubtedly be minimal. The subsection's disciplinary procedure will be invoked, in all probability, only infrequently. Even if the subsection's sanction does gain clout, organizational dysfunction may result, outweighing the intended benefits of more careful disclosure decisions. In sum, it appears that the significance of the disciplinary sanction provision is largely symbolic.

6. FOIA Problem Areas

a. *Discovery and the FOIA.* Two questions have arisen concerning the relationship between the FOIA and the law of discovery. The first question is whether the government can use an FOIA exemption as a defense against a discovery motion.¹⁰⁹⁸ While this issue could arise in connection with any of the exemptions,¹⁰⁹⁹ it has occurred most frequently in exemption five cases due to the express reliance on discovery standards in that exemption.¹¹⁰⁰ Several courts have permitted the government to assert exemption five as a defense

1096. *Id.* at 218 (statement of D. Malone, Office of Telecommunications, Department of Commerce).

1097. For example, in the Department of Justice, appeal of the initial denial is made directly to the Attorney General. 28 C.F.R. § 16.7 (1975). Since the Attorney General is appointed by the President, subject to Senate approval, 28 U.S.C. § 503 (1970), he is not a member of the competitive service. 5 C.F.R. § 1.2 (1975). Thus, existing procedures for "adverse actions" are inapplicable to him. 5 C.F.R. § 752.103 (a)(4) (1975). Since Congress, by enacting subsection (a)(4)(F), has apparently authorized the CSC to exercise jurisdiction over *all* officers and employees to determine whether their conduct should be subject to disciplinary sanction, the CSC could amend its regulations to apply to those officers who are not in the competitive service.

1098. Clearly the discovery rules should not be used to withhold material that should be disclosed under the FOIA. *See Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore*, 508 F.2d 945, 950 (4th Cir. 1974).

1099. *See Note*, 74 COLUM. L. REV. 895, *supra* note 333, at 928-29. *See also Note*, 8 U. MICH. J. L. REF. 329, *supra* note 333, at 339.

1100. Exemption five protects from disclosure internal agency memoranda "which would not be available by law to a party other than an agency in litigation with the agency." *See text at notes 648-99 supra.*

against discovery.¹¹⁰¹ However, since the FOIA expressly rejects consideration of individual need, while discovery procedures encourage balancing of individual interests, it may be unfair to a litigant to deny discovery on the basis of an FOIA exemption. One court has recognized this fundamental distinction and found that "the fact that § 552(b) of the Information Act provides specified exemptions from the Act's public information requirements does not in and of itself create a judicial discovery privilege with respect to such exemptions."¹¹⁰²

The second question that has arisen is whether a litigant may use an FOIA suit rather than discovery procedures to obtain information.¹¹⁰³ Certainly, if information should be released under the FOIA, a litigant should be able to use that information at trial. A court may, however, be reluctant to stay judicial or agency proceedings while a litigant pursues his FOIA remedies since this may result in unnecessary delay.¹¹⁰⁴

In resolving these questions, it is important to note that the policies behind the FOIA and the discovery procedures are entirely different. The purpose of the FOIA is public disclosure of as much information as possible; the discovery rules are concerned with individual requests made during litigation, and have as their primary goal the elimination of surprise and unfair trial practices. The two should not be used interchangeably.

b. *Equity powers of the judiciary in FOIA cases.* The lower federal courts are divided on the question whether they retain equitable discretion in FOIA cases to permit the withholding of information that does not fall within any of the Act's exemptions.¹¹⁰⁵

1101. *E.g.*, *Ginsburg v. Richardson*, 436 F.2d 1146 (3d Cir. 1971), *cert. denied*, 402 U.S. 976 (1971), where the court relied partially on exemption five to quash a subpoena requiring the production of an agency report; *Talbott Constr. Co. v. United States*, 49 F.R.D. 68 (E.D. Ky. 1969), where the court applied exemption five to deny discovery of some IRS letters and memoranda in a tax refund case.

1102. *Verrazzano Trading Corp. v. United States*, 349 F. Supp. 1401, 1403 (Cust. Ct. 1972). *See* *Kerr v. United States Dist. Ct.*, 511 F.2d 192, 197 (9th Cir. 1975); *B & C Tire Co., Inc. v. IRS*, 376 F. Supp. 708, 713 (N.D. Ala. 1974).

1103. *Compare* *Hawkes v. IRS*, 467 F.2d 787, 792-93 (6th Cir. 1972), and *United States v. Wahlin*, 384 F. Supp. 43, 47 (W.D. Wis. 1974) (FOIA may be used as an alternative to discovery), *with* *Seafarers Intl. Union v. Baldwin*, 508 F.2d 125, 128-29 (5th Cir. 1975) ("[T]he [FOI] Act was not intended to create a redundant power in this district court to require a government agency litigant in the appeals court of the District of Columbia to furnish that latter court with documents from which it can select those needed to exercise its judicial functions"); *National Cable Television Assn., Inc. v. FCC*, 479 F.2d 183, 193 (D.C. Cir. 1973) ("these matters should be settled through the discovery process as much as possible") (dictum), and *Williams v. IRS*, 345 F. Supp. 591, 594 (D. Del. 1972), *affd.*, 479 F.2d 317 (3d Cir. 1973) (FOIA does not affect "rights of specific persons under government investigation and seeking the files dealing with them").

1104. *See* text at notes 989-96 *supra*.

1105. There are three possible opportunities for the courts to exercise discretion in applying the FOIA exemptions. The discussion here considers the exercise of

The FOIA states that it "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in [the Act]."¹¹⁰⁶

A majority of the courts have held that the only exceptions to disclosure under the FOIA are those expressly provided for in the Act and that the courts do not have the equitable power to deny disclosure if the requested information is not exempt.¹¹⁰⁷ In *EPA v.*

equitable discretion to refuse to order disclosure despite a finding that the requested information does not fall within any specific exemption. A court could also exercise discretion to order the release of information that has been found to be protected by a specific exemption. See text at notes 1141-51 *infra*. Finally, discretion may enter into the decision whether the requested material is within the scope of an exemption. The proper role of the courts in balancing the various purposes of the exemptions in the process of statutory interpretation is discussed in the text at notes 496-500 *supra*.

1106. 5 U.S.C. § 552(c) (1970). See generally K. DAVIS, *supra* note 265, §§ 3A.6, 3A.15 (Supp. 1970); Engel, *supra* note 282, at 193-94; Kramer & Weinberg, *supra* note 333, at 59-62; Project, 1972 DUKE L.J. 115, *supra* note 323, at 144-46; Project, *Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 67, 95-98; Note, 74 COLUM. L. REV. 895, *supra* note 333, at 911-20; Note, *Administrative Law—The Freedom of Information Act and Equitable Discretion*, 51 DENVER L.J. 263 (1974); Note, 1975 DUKE L.J. 416, *supra* note 333, at 424-27; 1973 DUKE L.J. 178, *supra* note 333, at 178-86; Note, 42 GEO. WASH. L. REV. 869, *supra* note 323, at 879 n. 64; Note, 47 ST. JOHN'S L. REV. 694, *supra* note 750, at 708-11; 85 HARV. L. REV. 861, 862 n.11 (1972); 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 121 (1970); 47 IND. L.J. 530, 542-45 (1972); 45 IND. L.J. 421 (1970); 51 TEXAS L. REV. 119, 124 (1972); 44 TUL. L. REV. 800 (1970); 6 U. TOLEDO L. REV. 215, 231-36 (1974).

1107. See, e.g., *Tax Analysts & Advocates v. IRS*, 505 F.2d 350, 355 (D.C. Cir. 1974), *modifying* 362 F. Supp. 1298, 1309 (D.D.C. 1973); *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427, 429 (4th Cir.), *cert. denied*, 419 U.S. 834 (1974); *Robles v. EPA*, 484 F.2d 843, 847 (4th Cir. 1973); *Hawkes v. IRS*, 67 F.2d 787, 792 (6th Cir. 1972) (*dictum*); *Tennessee Newspapers, Inc. v. FHA*, 464 F.2d 657, 661-62 (6th Cir. 1972); *Getman v. NLRB*, 450 F.2d 670, 677-80 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1076-77 (D.C. Cir. 1971); *Black v. Sheraton Corp. of America*, 371 F. Supp. 97, 102 (D.D.C. 1974); *Wine Hobby, USA, Inc. v. Bureau of Alcohol, Tobacco & Firearms*, 363 F. Supp. 231, 236 (E.D. Pa. 1973), *revd. on other grounds*, 502 F.2d 133 (3d Cir. 1974); *Legal Aid Soc. v. Shultz*, 349 F. Supp. 771, 774 (N.D. Cal. 1972); *Stokes v. Hodgson*, 347 F. Supp. 1371, 1376-77 (N.D. Ga. 1972), *affd. sub nom. Stokes v. Brennan*, 476 F.2d 699, 701 (5th Cir. 1973); *Sears, Roebuck & Co. v. NLRB*, 347 F. Supp. 751, 754 (D.D.C. 1972), *affd.*, 480 F.2d 1195 (D.C. Cir. 1973), *affd.*, 43 U.S.L.W. 4491, 4496 (U.S. April 29, 1975). See also *EPA v. Mink*, 410 U.S. 73, 79 (1973); *Rose v. Department of the Air Force*, 495 F.2d 261, 269-70 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3451 (U.S. Feb. 14, 1975) (No. 74-489); *Cervantes v. Time, Inc.*, 464 F.2d 986, 995 n.14 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Nicholas v. United States*, 460 F.2d 671, 673 (10th Cir. 1972), *cert. denied*, 409 U.S. 966 (1972); *People v. Richardson*, 351 F. Supp. 733, 734 (N.D. Cal. 1972); *Weckler v. Shultz*, 324 F. Supp. 1084, 1086 (D.D.C. 1971). Cf. *NLRB v. Getman*, 404 U.S. 1204 (1971), where Justice Black's denial of a stay arguably resolved the question of the federal courts' residual equitable powers to expand the exemptions. Justice Black, Acting Circuit Justice, implied that only the statutory exemptions could prevent disclosure: "The [NLRB] was created by Congress and Congress has seen fit to make identifiable records of the Board and other government agencies available to any person upon proper request. I find no exception in the Freedom of Information Act which would authorize the Board to refuse promptly to turn over the requested records." 404 U.S. at 1204-05. However, the court in *Tennessee Newspaper, Inc. v. FHA*, 464 F.2d 657, 661 (6th Cir. 1972), noted that the stay application in *Getman* did not directly present the residual equitable discretion question and cannot be viewed as dispositive of the issue. On this point see Kramer & Weinberg, *supra* note 333, at 61 n.83.

Mink,¹¹⁰⁸ the Supreme Court implied that this result is correct, stating that "these exemptions are explicitly made exclusive, 5 U.S.C. § 552(c), and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed."¹¹⁰⁹ Some courts, however, have reached the opposite conclusion, finding that the FOIA does not preclude the exercise of equitable discretion to deny disclosure.¹¹¹⁰

Congress has the power to limit the equitable discretion of federal courts in order to implement important federal legislative policy.¹¹¹¹ It has been held, however, that deprivation of the traditional equity powers of the courts is not to be lightly inferred.¹¹¹² The language of the statute and its legislative history must clearly indicate that such a deprivation was intended. Ambiguities must be resolved "in favor of that interpretation which affords a full opportunity for equity courts to exercise their traditional practices."¹¹¹³

The language of section 552(c) appears clearly to limit judicial discretion to order the disclosure of nonexempt information. That section provides that the FOIA does not authorize the withholding

The language in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) is often cited when equitable discretion is denied:

Most significantly the Act expressly limits the grounds for nondisclosure to those specified in the exemptions. Through the general disclosure requirement and specific exemptions, the Act thus strikes a balance among factors which would ordinarily be deemed relevant to the exercise of equitable discretion, *i.e.*, the public interest in freedom of information and countervailing public and private interests in secrecy. Since judicial use of traditional equitable principles to prevent disclosure would upset this legislative resolution of conflicting interests, we are persuaded that Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself.

488 F.2d at 1077 (footnotes omitted). The *Soucie* result was approved by a House committee reviewing the operation of the FOIA. See H.R. REP. NO. 92-1419, *supra* note 327, at 77.

1108. 410 U.S. 73 (1973). See *Rabbitt v. Department of the Air Force*, 383 F. Supp. 1065, 1070 (S.D.N.Y. 1974), where the court cited *Mink* for the proposition that courts do not have equitable discretion to refuse to order disclosure of nonexempt materials.

1109. 410 U.S. at 79.

1110. See, *e.g.*, *Theriault v. United States*, 503 F.2d 390, 392 (9th Cir. 1974) (dictum); *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 66 n.15 (D.C. Cir. 1974); *GSA v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969), *affg.* 289 F. Supp. 590 (W.D. Wash. 1968); *Long v. IRS*, 349 F. Supp. 871, 873 (W.D. Wash. 1972); *Consumers Union of United States, Inc. v. Veterans Admn.*, 301 F. Supp. 796, 806 (S.D.N.Y. 1969); *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 594 (D.P.R. 1967). These decisions have been criticized as not having been "the product of sedulous analysis. [The courts] examined neither the relevant legislative history nor the text of the FOIA to support their bald conclusion that traditional equity principles should guide the courts in administering the FOIA." Note, 74 COLUM. L. REV. 895, *supra* note 333, at 912.

1111. See *Soucie v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971). See also *Virginia Ry. Co. v. System Fedn.* No. 40, 300 U.S. 515, 549-53 (1937); *K. Davis*, *supra* note 265, § 3A.15, at 142 (Supp. 1970).

1112. See *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944).

1113. *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944).

of information "except as specifically stated in [the Act]."¹¹¹⁴ Several courts have concluded that this language should be read literally: Any information not within an exemption must be disclosed.¹¹¹⁵ The enforcement clause of the FOIA, however, can be read to conflict with this interpretation of 552(c).¹¹¹⁶ That clause provides, in part: "On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld"¹¹¹⁷ The Supreme Court held that similar language in another statute did not deprive courts of their traditional discretion to render equitable relief.¹¹¹⁸ But the Court has indicated that such language can be read to eliminate equitable discretion if there exists a clear conflict between the courts' retention of equitable discretion and the broad purposes of the legislation,¹¹¹⁹ or if there is a strong indication of congressional intent to restrict the equity powers of courts.¹¹²⁰

1114. 5 U.S.C. § 552(c) (1970). "The pull of the word 'specifically' is toward emphasis on statutory language and away from all else—away from implied meanings, away from reliance on legislative history, away from needed judicial legislation." K. Davis, *supra* note 265, § 3A.15, at 142 (Supp. 1970).

1115. See, e.g., *Cervantes v. Time, Inc.*, 464 F.2d 986, 995 n.14 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Nichols v. United States*, 460 F.2d 671, 673 (10th Cir. 1972), *cert. denied*, 409 U.S. 966 (1972); *People v. Richardson*, 351 F. Supp. 733, 734 (N.D. Cal. 1972); *Weckler v. Shultz*, 324 F. Supp. 1084, 1086 (D.D.C. 1971).

1116. This argument is outlined in Note, 74 COLUM. L. REV. 895, *supra* note 333, at 914. Cf. *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974). In *Bannerkraft Clothing*, the Court reviewed orders enjoining the Board from withholding documents requested under the FOIA and from conducting any further renegotiation proceedings until the documents were produced. The Court examined the language of the enforcement clause and concluded that with "the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court." 415 U.S. at 20. The Court, however, was not referring to the equitable discretion to determine whether documents must be disclosed under the FOIA; it was discussing only the equitable discretion to fashion additional means of enforcing the Act. 415 U.S. at 18, 20. Congress could well have intended to limit judicial discretion in the initial disclosure decision, without intending to limit the courts' ability to fashion additional sanctions. (The Court of Appeals in *Bannerkraft Clothing* had stated that its determination that a court could issue an injunction prohibiting further proceedings "is unchanged by the decision of this and other courts holding that the Freedom of Information Act does not permit a court to balance the equities before ordering release of records within the Act's ambit." 466 F.2d 345, 353 (D.C. Cir. 1972).)

1117. 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975). See text at notes 943-64 *supra*.

1118. See *Hecht Co. v. Bowles*, 321 U.S. 321 (1944) (refusing to construe the language establishing remedies under the Emergency Price Control Act to deprive the courts of their equitable discretion in the absence of a sufficient indication of legislative intent); Note, 74 COLUM. L. REV. 895, *supra* note 333, at 915-18. See also 4 1972 *House Hearings*, *supra* note 326, at 1077 (testimony of F. Wozencraft).

1119. See *United States Steelworkers of America v. United States*, 361 U.S. 39 (1959), where the Court held that the language of the Taft-Hartley Act mandated the issuance of an injunction once certain facts were found. The majority opinion did not attempt to distinguish *Hecht*, but Justices Frankfurter and Harlan, in their concurring opinion, pointed out that the broad purposes of the Act would be vitiated if a court, exercising equitable discretion, denied injunctive relief. 361 U.S. at 55-59.

1120. See *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316 (1961). The

Since the only method provided by Congress for enforcing the FOIA is through actions for injunctive relief, all limitations on the availability of such relief arguably run counter to the purposes of the Act.¹¹²¹ Furthermore, congressional intent to restrict the courts' discretion to grant relief under the FOIA can be found in the legislative history. Speaking directly to the purpose of section 552(c), the Senate report on the original bill said, "The purpose of this subsection is to make it clear beyond doubt that all *materials* of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in subsection (b)."¹¹²² Although the House report contains some contrary language on the question,¹¹²³ it is a less authorita-

Court, citing *Hecht*, said that Congress will "not be deemed to have restricted the broad remedial powers of courts of equity without explicit language doing so, in terms, or some other strong indication of intent." 366 U.S. at 316 (1961) (emphasis added).

1121. See *Soucie v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971) ("The chief purpose of the new Act was to increase public access to governmental records by substituting limited categories . . . for . . . discretionary standards, and providing an effective judicial remedy"). See also text at notes 128-31 *infra*. But see Note, 74 COLUM. L. REV. 895, *supra* note 333, at 917 ("[I]t cannot seriously be contended that the success of the FOIA is inexorably linked to an automatic grant of injunctive relief").

1122. S. REP. NO. 89-813, *supra* note 310, at 10 (emphasis original). The Senate report also states:

S. 1160 would emphasize that section 3 of the Administrative Procedure Act is not a withholding statute but a disclosure statute by the following major changes:

(1) It sets up workable standards for what records should and should not be open to public inspection. In particular, it avoids the use of such vague phrases as "good cause found" and replaces them with specific and limited types of information that may be withheld.

Id. at 5.

1123. The House report is self-contradictory. While it recognizes that the Act "sets up workable standards for the categories of records which may be exempt from public disclosure, replacing the vague phrases good cause found, in the public interest, and internal management with specific definitions of information which may be withheld," H.R. REP. NO. 89-1497, *supra* note 310, at 2, and that the purpose of the Act "is to make clear beyond doubt that all materials of Government are to be available to the public unless specifically exempt from disclosure by the provisions of subsection (e) or limitations spelled out in earlier subsections," *id.* at 11, it interprets the enforcement section to mean that "[t]he court will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld." *Id.* at 9.

The Attorney General's Memorandum, because it relies on the House report, is also self-contradictory. It quotes the House report's discussion of the purposes of the Act, see ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 39, and then comments on the enforcement section:

The injunction is an equitable remedy. As the above language recognizes, in a trial de novo under subsection (c) the district court is free to exercise the traditional discretion of a court of equity in determining whether or not the relief sought by the plaintiff should be granted. In making such determination the court can be expected to weigh the customary considerations as to whether an injunction or similar relief is equitable and appropriate, including the purposes and needs of the plaintiff, the burdens involved, and the importance to the public interest of the Government's reason for nondisclosure. See *Hecht Co. v. Bowles*, 321 U.S. 321 (1944); *United States v. Reynolds*, 345 U.S. 1 (1953); 2 POMEROY'S EQUITY JURISPRUDENCE 397-404 (Symons 5th ed. 1941).

Id. at 28.

tive source.¹¹²⁴ A report issued by a House committee, after hearings in 1972 reviewing the operation of the FOIA, also supports the view that federal courts have no equitable discretion to refuse to order disclosure:

Finally, some courts have decided for themselves that it is discretionary with them whether they order the production of information which is held not to be subject to the exemptions permitted by subsection (b) of the FOI Act. In effect, they are applying theories of equity to balance the need of the individual citizen to the information requested under the act and the need of the Government to withhold such information. Information requested under the act by the plaintiff should be considered only with respect to whether or not the Government's arguments fulfill the "burden of proof" requirement that the information is subject to the subsection (b) exemptions claimed. If the court finds that the Government has not met such test, the information should be ordered to be made promptly available to the plaintiff solely on the substantive merits of the case.¹¹²⁵

The legislative history demonstrates that Congress sought to weigh carefully all competing interests involved in the disclosure controversy. Upon balancing those interests, it created specific exemptions for the limited instances in which nondisclosure would be justifiable.¹¹²⁶ It did not intend that the federal courts, through the exercise of their equity powers, be allowed to alter that balance.¹¹²⁷ Thus, the FOIA enforcement clause should not be construed to allow courts to exercise discretion in ordering the disclosure of non-exempt records.

Policy considerations also support the conclusion that the courts should not retain this equitable power.¹¹²⁸ First, if the courts are

1124. See note 323 *supra*.

1125. H.R. REP. NO. 92-1419, *supra* note 327, at 77. See *id.* at 3; 5 1972 House Hearings, *supra* note 326, at 1377-78 (it "was not the intention of the drafters" that the courts should apply "theories of equity") (testimony of B. Fensterwald, Jr.).

1126. See text at notes 496-500 *supra*.

1127. Professor Engel argues that if courts retain this equitable power, congressional intent to eliminate the uncertainties that arose under the APA disclosure provisions will be undermined. See Engel, *supra* note 333, at 193. He also notes that there is "some danger that the provision imposing the burden on the agencies to establish the basis for an exemption will be substantially diminished, if the equity considerations become confounded by judicial deference to agency determinations." *Id.* at 193-94 (footnotes omitted).

1128. The government has argued that two policy considerations support the opposite conclusion. See Brief for Appellees at 29-35, *Rose v. Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3435 (U.S. Feb. 18, 1975) (No. 74-489) [hereinafter Brief for Appellees]. First, it has argued that the policy of the general administrative statutory scheme supports the conclusion that the courts retain their equitable powers under the FOIA. The judicial review provision of the FOIA (5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975)), giving the courts the power to review the matter *de novo* is, the government contended:

allowed to exercise their equitable discretion to escape the dictates of the Act, increased uncertainty as to the validity of any particular claim for documents will inevitably result. Uncertainty may deter requesters from questioning an agency decision not to disclose the requested information.¹¹²⁹ Since requesters would be less confident of the validity of their legal position, the potential expense of a lost legal battle might keep them from seeking judicial redress. And second, the knowledge that courts might exercise equitable discretion might encourage agencies to withhold information. If disclosure is not mandatory upon a finding that the requested information is not exempt, agency officials might continue to refuse disclosure in the hope of persuading a court to exercise its equity powers in their favor.¹¹³⁰

Examination of the language of the statute, of the relevant legislative history, and of the policies behind the FOIA suggests that Congress intended to eliminate the courts' equitable discretion under the FOIA. Congress intended its balancing process to be conclusive; it was willing to risk undesirable results in those few cases where the congressional balance may be inequitable in order to ensure a substantial increase in the amount of government information available to the public.¹¹³¹

an exception to the traditional rule of administrative law that the basic decision is within the discretion of the agency and that judicial power is invoked only for review of alleged abuse of discretion or error of law. It is highly unlikely that Congress—having vested such extraordinary authority in district courts in an area of vital public concern—would at the same time have stripped those courts of their traditional equitable power to act or decline to act so as to fulfill equitable principles and the public interest.

Brief for Appellees at 30-31.

Second, the government has cited examples of information that would not be exempt under the Act, but that it claims Congress intended to keep confidential. For example, the government has pointed to Professor Davis' example of confidential communications between the President and the governor of a state about plans for racial tranquility. *See* K. DAVIS, *supra* note 265, § 3A.21, at 156 n.85 (Supp. 1970). The government argues that these communications are not clearly within any of the specific exemptions and would be required to be disclosed if the courts were denied equitable discretion. Brief for Appellees at 31-32.

The court in *Rose* did not reach the merits of these claims by the Government. However, with respect to the first claim, the legislative history shows that Congress did clearly intend to deprive the courts of their equitable discretion in addition to giving them de novo review powers. *See* text at notes 1122-27 *supra*. The second claim is part of a general "foreseeability" problem that arises whenever Congress legislates. *Cf.* note 1131 *infra*.

1129. 45 IND. L.J. 421, 425-26 (1970). *See also* Kramer & Weinberg, *supra* note 333, at 60.

1130. 45 IND. L.J. 421, 426 (1970). The House report on the FOIA indicates that one of the purposes of the Act was to "serve as influence against the initial wrongful withholding." H.R. REP. NO. 89-1497, *supra* note 310, at 9. The continued possibility of a court expressing its discretion to support an agency's refusal to disclose would only encourage such refusals and thus defeat this purpose.

1131. Professor Davis disagrees with this general conclusion and advocates that the courts exercise their equitable discretion in administering the FOIA. K. DAVIS, *supra*

c. *"Reverse FOIA" suits.* Most FOIA cases have arisen in the context of a requester seeking information from an agency that has refused disclosure.¹¹³² In a few recent cases,¹¹³³ however, persons who have supplied information to the government have asked the courts to enjoin the disclosure of that information to requesters. These "reverse FOIA"¹¹³⁴ cases may also arise when an agency has obtained information about a person from third parties, other agencies, or its own investigation, and the subject of that data wants to prevent its disclosure. Two holdings that emerge from one of these reverse FOIA cases¹¹³⁵ may radically affect the future operation of the Act. The first is that a "supplier"¹¹³⁶ may obtain judicial review of an agency's decision to release information; the second is that agencies may have the discretion to release material that is exempt from disclosure under the FOIA. The following discussion will conclude that, although reverse FOIA suits may distort the statutory scheme, these suits should be permitted so long as the Act's exemptions are viewed as permissive, rather than mandatory.

Although there does not appear to be any procedural basis for precluding supplier suits,¹¹³⁷ the language of the FOIA strongly sug-

note 265, §§ 3A.6, 3A.32 (Supp. 1970). Professor Davis points to various drafting errors in the FOIA and argues that equitable discretion is needed to ensure the effective operation of the Act by allowing remedial judicial "legislation." *Id.* at 177. *But see* 45 IND. L.J. 421, 432-34 (1970). Continued congressional attention to the operation of the FOIA, as manifested in the 1974 amendments, suggests that such judicial legislation is unnecessary.

1132. *E.g.*, *EPA v. Mink*, 410 U.S. 73 (1973). *See* Brief for Appellant at 8, *Charles River Park "A", Inc. v. HUD*, Civil No. 73-1930 (D.C. Cir. March 10, 1975).

1133. *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769 (D.D.C. 1974); *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996 (D.D.C.), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292 (C.D. Cal. 1974); *Westinghouse Elec. Corp. v. Schlesinger*, Civil No. 118-74-A (E.D. Va. April 3, 1974); *Charles River Park "A", Inc. v. HUD*, 360 F. Supp. 212 (D.D.C. 1973), *remanded*, Civil No. 73-1930 (D.C. Cir. March 10, 1975). The factual pattern of these cases is essentially the same. The plaintiff had submitted information to a government agency, often in compliance with government regulations. A third party requested that information from the government, and the plaintiff sued the government to enjoin disclosure. *But cf.* *Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171, 1173 (D.D.C. 1973), in which a company which had supplied information to the government was allowed to intervene in an FOIA suit for disclosure of that information.

These reverse FOIA suits can arise under any of the exemptions. *See, e.g.*, *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1001-02 (D.D.C.), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974) (considering claims arising under exemptions three, four, six, and seven). Claims are more likely to arise under those exemptions that are based, at least in part, on the interests of the supplier—for example, exemptions four, six, and seven. *See* text at notes 496-500 *supra*.

1134. *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1006 (D.D.C.), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974).

1135. *Charles River Park "A", Inc. v. HUD*, Civil No. 73-1930 (D.C. Cir. March 10, 1975). *See generally* Note, 1975 DUKE L.J. 416, *supra* note 333, at 427-32.

1136. Hereinafter the term "supplier" will refer to a person who is the subject of information, whether or not that person has given the information to the government.

1137. The courts have rejected sovereign immunity as a defense to these suits. *See*

gests that the Act gives judicial remedies only to requesters. For example, the provision that confers jurisdiction on the federal courts speaks only in terms of a complainant who has been denied information.¹¹³⁸ Supplier suits not only violate the statutory language of the FOIA, they also interfere with the Act's obvious intent to discourage agencies from withholding information. The statute provides that agency officials who deny access to requesters may incur de novo court review of their actions, assessment of court costs against their agencies, and investigation by the Civil Service Commission.¹¹³⁹ With the emergence of reverse FOIA suits, however, officials are confronted with a new threat: court review of decisions to disclose. The FOIA was designed to counteract and outweigh the pressures officials may be under to withhold information;¹¹⁴⁰ it was not intended to create them. Thus, reverse FOIA suits upset the skewed balance in favor of disclosure established by the Act.

The problems raised by allowing suppliers to bring reverse FOIA suits are inextricably linked to the question whether the Act's exemptions are mandatory or permissive. Only two of the reverse FOIA cases¹¹⁴¹ have reached the issue whether the Act *requires* the agencies to withhold exempt material or merely *permits* such withholding. Surprisingly, this mandatory-permissive issue has not been raised by requesters in their suits to obtain disclosure.¹¹⁴² In *Charles River*

Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292, 294 (C.D. Cal. 1974); *Scars, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1001 (D.D.C.), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974); *Westinghouse Elec. Corp. v. Schlesinger*, Civil No. 118-74-A, mem. op. at 3 (E.D. Va. April 3, 1974). The courts in *Hughes*, 384 F. Supp. at 294, and *Westinghouse*, Civil No. 118-74-A, mem. op. at 3, found that subject matter jurisdiction was based on the FOIA. This position was explicitly rejected in *Sears*: "[The FOIA] provides a right to *de novo* court review for those who are denied information, not for those who would suppress it." 384 F. Supp. at 1000. The court, however, allowed the suit under the APA, 5 U.S.C. §§ 701-06 (1970), 384 F. Supp. at 1000-01. The APA also provided the basis for jurisdiction in *Charles River Park "A", Inc. v. HUD*, Civil No. 73-1930 (D.C. Cir. March 10, 1975).

1138. "On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975). See text at notes 943-64 *supra*. Other sections of the Act also speak only in terms of requesters' suits. See, e.g., 5 U.S.C.A. §§ 552(a)(4)(F) (a court may order "the production of any agency records improperly withheld . . ."); (a)(6)(A) ("[e]ach agency, upon any request for records . . ."); (a)(6)(C) ("[a]ny person making a request to any agency for records . . .") (Supp. Feb. 1975). See also 5 U.S.C.A. § 552(d) (Supp. Feb. 1975) (reverse FOIA suits are not included in the list of FOIA-related matters to be reported by the agencies to Congress).

1139. 5 U.S.C.A. §§ 552(a)(4)(B), (E), (F) (Supp. Feb. 1975). See text at notes 965-1097 *supra*.

1140. See, e.g., S. REP. 93-854, *supra* note 329, at 1-2, 5.

1141. *Charles River Park "A", Inc. v. HUD*, Civil No. 73-1930, slip op. at 7 (D.C. Cir. March 10, 1975); *Westinghouse Elec. Corp. v. Schlesinger*, Civil No. 118-74-A, mem. op. at 5, 8 (E.D. Va. April 3, 1974).

1142. If the exemptions were found to be permissive, a requester could argue that

Park "A", Inc. v. HUD,¹¹⁴³ the District of Columbia Circuit Court held that a finding that information was exempt did not preclude agency disclosure.¹¹⁴⁴ In the earlier case of *Westinghouse Electric Corp. v. Schlesinger*,¹¹⁴⁵ a district court, rejecting the government's argument that the exemptions are permissive,¹¹⁴⁶ enjoined release of financial information because it was within exemption four.¹¹⁴⁷

The statutory language and legislative history strongly support the holding in *Charles River* that the exemptions are permissive. The FOIA merely states that the mandatory disclosure provisions of section (a) do not apply to exempted materials.¹¹⁴⁸ Thus, the Act can easily be interpreted to mean that the exemptions determine only the maximum amount of information that may be withheld. This interpretation is consistent with the basic purpose of the FOIA,¹¹⁴⁹ since it permits the agencies to disclose what would otherwise be automatically exempt material. Several commentators, including the Attorney General, have agreed with this interpretation.¹¹⁵⁰ Significantly, the Senate report on the 1974 amendments to the Act stated: "Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only *permissive*."¹¹⁵¹

even though the information he sought was exempt from mandatory disclosure, the court should review the agency's discretionary decision not to permit disclosure.

1143. Civil No. 73-1930 (D.C. Cir. March 10, 1975).

1144. Slip op. at 7. See also *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1000 (D.D.C. 1974), stay dissolved, 509 F.2d 527 (D.C. Cir. 1974); *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 777 n.37 (D.D.C. 1974).

1145. Civil No. 118-74-A (E.D. Va. April 3, 1974).

1146. Slip op. at 8.

1147. Slip op. at 5-7.

1148. 5 U.S.C. § 552(b) (1970). The recent statement of the Supreme Court that "if the [requested documents] do fall within one of the Act's exempt categories, our inquiry is at an end for the Act 'does apply' to such documents," *NLRB v. Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4496 (U.S. April 28, 1975), was made in the context of a requester suit and precludes neither discretionary agency release of exempt materials nor court review of agency decisions to release such material.

1149. *Charles River Park "A", Inc. v. HUD*, No. 73-1930, slip. op. at 7 (D.C. Cir. March 10, 1975). The Act was intended to facilitate public access to government information. See text at notes 308-12 *supra*.

1150. See ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 2-3 ("Agencies should keep in mind that in some instances the public interest may best be served by disclosing, to the extent permitted by other laws, documents which they would be authorized to withhold under the exemptions"); K. DAVIS, *supra* note 265, § 3A.5, at 122 (Supp. 1970) ("The Act contains no provision forbidding disclosure The exemptions protect against required disclosure, not against disclosure"). In *Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore*, 508 F.2d 945, 950 (4th Cir. 1974), the court also agreed with this interpretation.

1151. S. REP. NO. 93-854, *supra* note 329, at 6 (emphasis original). The report adds: "A number of agencies have by regulation adopted this position that, notwithstanding

Thus, assuming that the exemptions are permissive, an agency must engage in a three-step analysis when it receives a request for information. First, it must determine if the information is exempt. Second, if it is exempt,¹¹⁵² it must then determine if another statute would prohibit disclosure.¹¹⁵³ If there is another statute barring disclosure of the information, it may prevent the agency from exercising discretion.¹¹⁵⁴ Finally, if there is no statutory prohibition, the agency must exercise its discretion to decide whether to release the information.¹¹⁵⁵ This third step raises the issues of the standard the agency should apply in exercising its discretion to release exempt information, whether there should be a modification of the general rule that release of information to one requester mandates release to the public in general, and whether this discretionary decision is reviewable by the courts and, if so, under what standard of review.

There has been very little discussion of the appropriate agency standard. *Charles River* implicitly suggests that the agency should balance the interests of the requester and the public against the interest of the supplier when deciding to release or withhold exempt information.¹¹⁵⁶ This balancing approach is inadequate because it fails to recognize that there is also a governmental interest in ensur-

the applicability of an FOIA exemption, records must be disclosed where there is no compelling reason for withholding. . . . This approach was clearly intended by Congress in passing the FOIA." *Id.* See also H.R. REP. NO. 93-221, *supra* note 160, at 59-60.

1152. If the material is not exempt, it must be released. 5 U.S.C.A. § 552(a) (Supp. Feb. 1975).

1153. If there is another statute prohibiting disclosure, the information requested may be exempt from disclosure under the FOIA as well. 5 U.S.C. § 552(b)(3) (1970) exempts materials that are "specifically exempted from disclosure by statute." See text at notes 568-610 *supra*.

1154. If the other statute exempts information under exemption three, see note 1153 *supra*, and itself leaves no room for the exercise of agency discretion, e.g., INT. REV. CODE OF 1954, § 7213(a)(1) (prohibiting the disclosure of information contained in income tax returns) (see *Tax Analysts & Advocates v. IRS*, 505 F.2d 350 (D.C. Cir. 1974)), then the agency should not be able to release the information pursuant to the FOIA. If the other statute exempts information under exemption three, but provides for the exercise of agency discretion, e.g., 49 U.S.C. § 1504 (1970) (permitting the Administrator of the FAA to determine whether certain documents filed pursuant to the Civil Aeronautics Act should be released) (see *FAA v. Robertson*, 43 U.S.L.W. 4833 (U.S. June 24, 1975)), then the agency should be able to use that discretion to release the information pursuant to the FOIA. At least one statute that has been held not to exempt information under exemption three, 18 U.S.C. § 1905 (1970) (providing criminal sanctions for unauthorized disclosure of confidential information) (see, e.g., *Charles River Park "A", Inc. v. HUD*, Civil No. 73-1930, slip op. at 8 (D.C. Cir. March 10, 1975)), has been found to bar voluntary disclosure of information falling within one of the other FOIA exemptions. See *Charles River Park "A", Inc. v. HUD*, Civil No. 73-1930, slip op. at 9-10 (D.C. Cir. March 10, 1975); *Westinghouse Elec. Corp. v. Schlesinger*, Civil No. 118-74-A, mem. op. at 7-8 (E.D. Va. April 2, 1974).

1155. *Charles River Park "A", Inc. v. HUD*, Civil No. 73-1930, slip op. at 6-11 (D.C. Cir. March 10, 1975), outlined this three-step analysis in a reverse FOIA case.

1156. Slip op. at 10-11.

ing that the supplier's information remains confidential.¹¹⁵⁷ The government may not be able to obtain the data necessary to make informed decisions unless it can assure suppliers that the information they give to the government will not be released. Furthermore, it is imperative that the agency require a showing that the interests of the requester and the public clearly outweigh the interests of the supplier and the government before it releases exempt information. In creating the exemptions, Congress has presumably determined that the interests of the supplier and the government are important enough to outweigh the general public interest in disclosure.¹¹⁵⁸ Thus, a decision to disclose exempt information should be based upon a showing that the requester's purpose is of extraordinary public benefit.¹¹⁵⁹

After the agency determines that an extraordinary public benefit is present, it should consider disclosing the information only to the requester. If the agency limits disclosure in this way, violation of the supplier's and government's interests in confidentiality will be minimized. This alternative may provide a satisfactory compromise between conflicting interests and has in fact been suggested by some courts.¹¹⁶⁰ Although by requiring disclosure to "any person"¹¹⁶¹ Congress made it clear that the particular purposes of individual requesters were not to be considered by the courts,¹¹⁶² it is arguable that a different rule should apply to an agency's discretionary decision to release exempt material. Since Congress would have allowed the agency to withhold such information altogether, the agency should be able to place restrictions on its release. This argument may be compelling, but it is not supported by the language of the statute. The courts should be encouraged to employ this alternative, but only a revision of the statute can ensure its uniform application.

Finally, there is the question whether suppliers can seek judicial review of these discretionary decisions. Despite the dangers inherent in allowing reverse FOIA suits,¹¹⁶³ it is imperative that suppliers be

1157. See *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 767-68 (D.C. Cir. 1974); note 636 *supra* and accompanying text.

1158. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971). See text at notes 496-500 *supra*.

1159. See, e.g., *Charles River Park "A", Inc. v. HUD*, Civil No. 73-1930, slip op. at 10 (D.C. Cir. March 10, 1975), in which the court pointed to the extra public benefits that might result from the disclosure of the information to the requester, "a local governmental body which intends to use the information in performance of the legitimate and traditional government function of assessing property for the purposes of taxation." Cf. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 2.

1160. See, e.g., *Charles River Park "A", Inc. v. HUD*, Civil No. 73-1930, slip op. at 11 (D.C. Cir. March 10, 1975). Cf. *Getman v. NLRB*, 450 F.2d 670, 677 n.24 (D.C. Cir. 1971); text at notes 723-26 *supra*.

1161. 5 U.S.C. § 552(a)(3) (1970). This language was not changed by the 1974 FOIA amendments.

1162. See note 458 *supra* and accompanying text.

1163. See text at notes 1138-40 *supra*.

allowed to sue in this context. The Act, through the nine exemptions, does take the supplier's and the government's interests into consideration.¹¹⁶⁴ If the exemptions are interpreted to be permissive so that agencies have the discretionary power to release exempt material, the protections afforded suppliers will be drastically reduced. It would be inappropriate to decrease the suppliers' protection further by barring reverse FOIA suits.

If courts agree to hear these suits, they should then subject these discretionary agency decisions to *de novo* review.¹¹⁶⁵ Although an agency does have expertise in evaluating the effect of release or withholding of information upon the government's interest, it would not seem to have particular expertise in evaluating either the public interest or the supplier's interests. Furthermore, the availability of *de novo* review may deter and correct any elements of agency bias.¹¹⁶⁶

If the exemptions were mandatory so that the agencies were prohibited from releasing exempt material, it would perhaps be appropriate for Congress to preclude most reverse FOIA suits. Barring these suits to ensure that the FOIA would continue to encourage disclosure would be justified because the supplier's and the government's interests generally would be sufficiently protected. One exception might be where individuals claimed that release of certain material would be an invasion of their privacy. It is doubtful that the mandatory exemptions would be sufficient protection in these cases. Congress has already recognized the importance of protecting the individual's right of privacy¹¹⁶⁷ and should continue this special treatment by permitting reverse FOIA suits in these instances.

Congress is thus left with the choice of encouraging disclosure through permissive exemptions at the cost of allowing supplier suits, or encouraging disclosure by barring supplier suits at the cost of making the exemptions mandatory. The first alternative is now in force, perhaps more by accident than by design. It is very difficult to evaluate its effect on disclosure since requesters have not argued for release of exempt information, and suppliers have only recently brought suits against the agencies. If the present scheme proves to affect adversely public access to information, Congress should con-

1164. See text at notes 496-500 *supra*.

1165. *De novo* review of agency decisions to withhold information is provided in 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975), formerly 5 U.S.C. § 552(a)(3) (1970). See text at notes 962-64 *supra*. *De novo* review of a decision to release seems to have been required in *Charles River Park "A", Inc. v. HUD*, No. 73-1930, slip op. at 4, 10-11 (D.C. Cir. March 10, 1975). But see *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1001 (D.D.C. 1974), where the court, basing jurisdiction on the APA, applied the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of 5 U.S.C. § 706(2)(A) (1970).

1166. See, e.g., L. JAFFE, *supra* note 865, at 621-22.

1167. See, e.g., Privacy Act of 1974, 5 U.S.C.A. § 552a (Supp. Feb. 1975). See text at notes 1966-2214 *infra*. See generally text at notes 1499-561 *infra*.

sider implementing the second alternative. In any case, no modifications to the present scheme should be made without recognizing the interdependence of the mandatory-permissive issue and the supplier suit.

D. State Open-Records Laws

A limited common-law right of access to information held by state agencies is generally recognized.¹¹⁶⁸ However, the vast majority of states have adopted legislation broadening this right.¹¹⁶⁹ During the past decade, many states that previously had no open-records laws have enacted them;¹¹⁷⁰ other states have replaced or amended extant statutes to expand the public right of access.¹¹⁷¹ The pace of this legislative activity, especially in the last three years, has been frenetic. The trend is almost certain to continue, and all states will probably have enacted such laws within the next several years.¹¹⁷²

1168. H. CROSS, *THE PEOPLE'S RIGHT TO KNOW* 55-56 (1953).

1169. See ALA. CODE tit. 41, §§ 145-47 (1959), tit. 55, § 289(6) (1960); ALAS. STAT. §§ 09.25.110-120 (1962); ARIZ. REV. STAT. ANN. § 39-121 (1974); ARK. STAT. ANN. §§ 12-2801 to -2807 (1968); CAL. GOVT. CODE §§ 6250-60 (West Supp. 1975); COLO. REV. STAT. ANN. §§ 24-72-201 to -206 (1973); CONN. GEN. STAT. ANN. §§ 1-19 to -20 (Supp. 1975); FLA. STAT. ANN. § 119.01 (1960), as amended, §§ 119.02, .07-.11 (Supp. 1974); GA. CODE ANN. §§ 40-2701 to -2703 (Supp. 1974); HAWAII REV. STAT. §§ 92-1 to -6 (1968); IDAHO CODE § 59-1009 (1948); ILL. REV. STAT. ch. 116, §§ 43.4-28 (Supp. 1974); IND. ANN. STAT. CODE §§ 5-14-1-1 to -6 (Burns 1974); IOWA CODE §§ 68A.1-.9 (1971); KAN. STAT. ANN. §§ 45-201 to -203 (1973); LA. REV. STAT. ANN. §§ 44:1 to :7, 44:31 to :39 (West 1950), as amended, (Supp. 1974); ME. REV. STAT. ANN. tit. 1, § 404-A (Supp. 1974), § 405 (1964); MD. ANN. CODE art. 76A, §§ 1-5 (Supp. 1974); MASS. ANN. LAWS ch. 66, §§ 1-18 (1971), as amended, ch. 4, § 7(26) (Supp. 1974); MINN. STAT. ANN. § 15.17 (1967), as amended, (Supp. 1974); MO. REV. STAT. §§ 109.180-190 (1969); MONT. REV. CODES ANN. § 59-512 (1970); MONT. CONST. art. II, § 9; NEB. REV. STAT. §§ 84-712 to -712.03 (1971); NEV. REV. STAT. § 239.010 (1973); N.H. REV. STAT. ANN. § 91-A (Supp. 1973); N.J. STAT. ANN. §§ 47:1A-1 to -4 (Supp. 1974); N.M. STAT. ANN. §§ 71-5-1 to -3 (Supp. 1973); N.Y. PUB. OFFICERS LAW §§ 85-89 (McKinney Supp. 1974); N.C. GEN. STAT. §§ 132-1 to -9 (1974); N.D. CENT. CODE § 44-04-18 (1960); OHIO REV. CODE ANN. §§ 149.40-.99 (Page 1969); OKLA. STAT. ANN. tit. 51, § 24 (1962); ORE. REV. STAT. §§ 192.410-500 (1974); PA. STAT. ANN. tit. 65, §§ 66.1-4 (1959), as amended, (Supp. 1974); S.C. CODE ANN. §§ 1-20 to -20.4 (Supp. 1974); S.D. COMP. LAWS ANN. § 1-27-1 to -3 (1974); TENN. CODE ANN. §§ 15-304 to -307 (1973), as amended, (Supp. 1974), § 15-308 (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 1-15 (Supp. 1974); UTAH CODE ANN. §§ 78-26-1 to -3 (1953), § 63-2-61 (Supp. 1973); VA. CODE ANN. §§ 2.1-341 to -345 (1973), as amended, (Supp. 1974); WASH. REV. CODE §§ 42.17.010, .250-.940 (1974); WIS. STAT. ANN. §§ 16.80, 19.21 (1972); WYO. STAT. ANN. §§ 9-692.1-5 (Supp. 1973). See also Model State Freedom of Information Statute [hereinafter Model FOIA] in R. Plessner & P. Petkas, *Government in the Sunshine, Open Records Open Meetings, Emphasis: Texas* 34 (1975) (one of a series of 11 booklets published by the Southern Governmental Monitoring Project, each containing the Model FOIA, and each examining the law of a particular southern state).

1170. New York, for example, recently enacted such a law, effective Sep. 1, 1974. N.Y. LAWS ch. 578 (1974) (codified at N.Y. PUB. OFFICERS LAW §§ 85-89 (McKinney Supp. 1974)).

1171. See, e.g., MASS. ANN. LAWS ch. 66, § 10 (Supp. 1974), ch. 4, § 7(26) (Supp. 1974).

1172. See, e.g., Michigan House of Representatives, Bill No. 4272, introduced Feb. 11, 1975. The Michigan "Administrative Procedures Act" includes a provision

This legislative response has been prompted, at least in part, by the federal government's adoption of the Freedom of Information Act in 1967.¹¹⁷³ Indeed, these statutes are intended to further at the state level the same fundamental objectives that the federal act was intended to effect at the national level.¹¹⁷⁴ These objectives include encouraging the informed participation of citizens in the process of government, ensuring governmental accountability, and generally increasing public confidence in the political system.¹¹⁷⁵ Despite these common ends, it is evident that states differ widely, both among themselves and from the federal government, in the degree to which their laws ensure citizen access to government information.

This section of the Project will examine and compare the various state statutes dealing with the problem of public access and will point out particular state provisions that appear to be superior to their federal counterparts. Since the right of citizens to inspect public records has its roots in the English common law,¹¹⁷⁶ the analysis will consider the scope of the common-law right as well.

1. *The Significance of the Common-Law Right*

The common-law right of inspection, even as liberalized by the courts, is quite narrow and contains many technical and often arbitrary limitations. Although the right of inspection at the state level is now generally regulated by statute, the common-law right remains important in several ways. First, many of the present statutes are, at least in part, codifications of the common-law right. Second, many of the statutes now in effect are drawn very broadly and lack specific definitions of statutory terms. Thus, the courts must often turn to common-law definitions for guidance. Third, in those states that have not yet enacted open-records statutes,¹¹⁷⁷ the common law remains the sole source of the right of inspection. Finally, even in those states that have enacted comprehensive open-records statutes, the common law may remain an alternative source of the right of inspec-

for inspection of agency records. MICH. COMP. LAWS ANN. § 24.221-223 (Supp. 1974). However, this act does not appear to be a true open-records law. *But see* Note, *Michigan "Freedom of Information Act"*, 3 PROSPECTUS 441 (1970).

1173. *See* *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 635, 652, 117 Cal. Rptr. 106, 110 (1974); Marino, *The New York Freedom of Information Law*, 43 *FORDHAM L. REV.* 83 (1974).

1174. *Cf.* materials cited in note 1173 *supra*.

1175. *See* S. REP. NO. 89-813, *supra* note 310, at 2-3, ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at III.

1176. *See* *Nowack v. Auditor Gen.*, 243 Mich. 200, 219 N.W. 749 (1928); *Clement v. Graham*, 78 Vt. 290, 63 A. 146 (1906); H. CROSS, *supra* note 1168, at 25-26. It has also been suggested that this right may have constitutional roots. *See* *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 635, 654-55, 117 Cal. Rptr. 106, 111-12 (1974).

1177. Kentucky, Mississippi, and Rhode Island, for example.

tion:¹¹⁷⁸ Some statutes expressly preserve preexisting rights of access,¹¹⁷⁹ and some courts have held that the passage of an open-records law was not intended to abrogate the common-law right of access.¹¹⁸⁰

2. *The Elements of a Comprehensive Open-Records Law*

Whether based on a state statute or on the common law, the scope of the right of access to government information is determined by five factors: the inclusiveness of the definition of "public records," the number and substance of exemptions from disclosure, the nature of the interest required of a person attempting to exercise the right of inspection, the procedures available for enforcing the right, and the sanctions provided for violations of the right.¹¹⁸¹

a. *The definition of "public records."* Before it can be determined whether a right of access exists in a given case, the term "public records" must be defined. Ascertaining the scope of this term has occasionally proved to be a significant problem on the state level.¹¹⁸² Under the common law, problems may arise as a result of a

1178. Some open-records statutes, however, have been held to supersede the common law. *See, e.g., Meriden Record Co. v. Browning*, 6 Conn. Cir. 633, —, 294 A.2d 646, 648 (1971), which states that the common-law right has been "incorporated into" the Connecticut act (CONN. GEN. STAT. ANN. § 1-19 (Supp. 1975)). *Cf. 20 KAN. L. REV.* 525, 537 (1972). In such a case, a citizen's right of inspection is derived solely from the statute. *See, e.g., Wiley v. Woods*, 393 Pa. 341, 348, 141 A.2d 844, 848 (1958) (rejecting the contention that the Pennsylvania statute was not intended to "divest or restrict" inspection rights granted by the common law to a person with a personal or property interest in the examination of public records). *Cf. Mooney v. Temple Univ. Bd. of Trustees*, 448 Pa. 424, 429-30 n.10, 292 A.2d 395, 398 n.10 (1972).

1179. *See, e.g., N.Y. PUB. OFFICERS LAW* § 88.10 (McKinney Supp. 1974) ("Nothing in this article shall be construed to limit or abridge any existing right of access at law or in equity of any party to public records kept by any agency or municipality").

1180. *See Irval Realty Inc. v. Board of Pub. Util. Comms.*, 61 N.J. 366, 373, 294 A.2d 425, 429 (1972) ("the statute clearly was not intended to diminish or in anyway curtail the common law right of examination. That right remains unaffected by this legislation"); *People ex rel. Gibson v. Peller*, 34 Ill. App. 2d 372, 374-75, 181 N.E.2d 376, 378 (1962). *Cf. Tex. Atty. Gen. Open Records Dec. No. 25*, at 3 (March 7, 1974), which states that although records of the judicial branch are exempted from the Texas open-records act, the papers of the justice of the peace that were sought were required by law to be kept and thus were subject to the common-law right of inspection. *See also An Overview of the Law Governing Access to Information Held by Public Agencies in the State of Illinois and the City of Chicago*, 68 NW. U. L. REV. 223, 237 (1973) [hereinafter *Overview*] in Research Study, *Public Access to Information*, 68 NW. U. L. REV. 177 (1973).

1181. *See H. CROSS, supra* note 1168, at 6-7.

1182. This particular problem apparently has not arisen at the federal level. The provisions of the federal FOIA apply either to specifically enumerated categories of records, *see* 5 U.S.C. §§ 552(a)(1), (2) (1970), or to all records "reasonably described." *See* 5 U.S.C.A. § 552(a)(3) (Supp. Feb. 1975).

Some state statutes precisely define "public records." For example, the Texas Act contains a general definition of public information, TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3 (Supp. 1974), as well as a nonexhaustive list of specific records required to be made available. *See* TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 6 (Supp. 1974).

lack of well-articulated standards. Even in jurisdictions where the open-record statute contains an express definition, courts have had interpretative difficulty because of the existence of other statutes dealing with public records.¹¹⁸³ As one court noted "Whether a record is to be regarded as a public record in a particular instance will depend upon the purposes of the law which will be served by so classifying it. A record may be a public record for one purpose and not for another."¹¹⁸⁴

The courts have articulated several different common-law definitions of public records.¹¹⁸⁵ Most courts have held that, in the absence of an express statutory provision, the mere fact that a writing is in the custody of a public agency does not suffice to make it a public record.¹¹⁸⁶ The most restrictive definition limits the scope of public records, for the purposes of inspection, to records required by law to be kept.¹¹⁸⁷ For example, an early Florida supreme court opinion states, "A public record is a written memorial made by a public officer . . . [It] is one *required by law* to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done."¹¹⁸⁸ This definition has often been applied "when the legislature has left the term 'public records' undefined" in its access statute.¹¹⁸⁹

The Model FOIA also contains such a list. See Model FOIA, *supra* note 1169, § 5. See also N.Y. PUB. OFFICERS LAW § 88 (McKinney Supp. 1974). Amendments to this recently adopted act are already being proposed. One such proposal is to eliminate the list of accessible information and presume everything to be public unless specifically exempted. See N.Y. Times, Feb. 18, 1975, at 46, col. 4 (city ed.).

1183. See, e.g., *Citizens for Better Educ. v. Board of Educ.*, 124 N.J. Super. 523, 308 A.2d 35 (App. Div. 1973). In deciding to require disclosure of the results of standardized achievement tests under New Jersey's "right-to-know law," N.J. STAT. ANN. § 47:1A-1 to -4, (Supp. 1974), the court looked to the definition of public records contained in the "destruction-of-public-records law," N.J. STAT. ANN. § 47:3-16 (Supp. 1974).

1184. *MacEwan v. Holm*, 226 Ore. 27, 36, 359 P.2d 413, 417 (1961).

1185. H. CROSS, *supra* note 1168, at 42-45.

1186. See, e.g., *Coldwell v. Board of Pub. Works*, 187 Cal. 510, 202 P. 879 (1921); *Whelan v. Superior Court*, 114 Cal. 548, 46 P. 468 (1896).

1187. See Wash. Atty. Gen. Op. No. 99, at 7 (Oct. 15, 1973), citing *State ex rel. Cook v. Reed*, 36 Wash. 638, 79 P. 306 (1905); *Pickerell, Secrecy and the Access to Administrative Records*, 44 CALIF. L. REV. 305, 315 (1956). See also *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 597, 200 S. 739, 746 (1941).

1188. *Amos v. Gunn*, 84 Fla. 285, 303, 94 S. 615, 634 (1922) (emphasis added).

1189. Fla. Atty. Gen. Op. No. 074-215, at 2 (July 24, 1974). See [1967] OP. N.M. ATTY. GEN. 80, 81.

In *Town Crier, Inc. v. Chief of Police*, — Mass. —, 282 N.E.2d 379 (1972), the court, in considering the statutory definition of public records included in the Massachusetts statute then in effect, noted that although the right of inspection had been broadened over the years, the definition of public records had remained the same: "The current statutory definition which follows the 1902 revision, although less explicit in language than the first statutory definition, incorporates the provision of the original enactment that, for a book or a paper containing written entries to be

In an effort to broaden the common-law right of inspection, a number of courts have liberalized the definition of public records. For example, in *International Union, UAW v. Gooding*,¹¹⁹⁰ the Wisconsin supreme court stated: "It is the rule independently of statute that public records include not only papers specifically required to be kept by a public officer but *all* written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate or customary method of discharging the duties of the office."¹¹⁹¹ Even such liberalized definitions may be interpreted narrowly by the courts. In a recent Iowa case, the court accepted a definition similar to the one stated in *Gooding*, but held that the requested documents were not "public records" subject to inspection because they did not evidence any action taken by the agency.¹¹⁹²

Some courts have further expanded the common-law definition. In *MacEwan v. Holm*,¹¹⁹³ the court had to interpret the Oregon open-records statute, which failed to define public records. It concluded:

We do not think it is necessary to look outside of our statute . . . permitting the inspection of "any public writing" and "records and files" [in order] to authorize the inspection of tentative or preliminary data in the possession of a governmental agency. For the purpose of deciding whether a writing is subject to public inspection, we regard *all data* gathered by the agency in the course of carrying out its duties, irrespective of its tentative or preliminary character, as falling within the definition of "records and files."¹¹⁹⁴

The court emphasized that such an expansive definition of public records was fundamental to an effective implementation of the general policy underlying "freedom of information." The court stated: "Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of

a public record, the entries must have been made pursuant to a requirement of law."
— Mass. at —, 282 N.E.2d at 382.

1190. 251 Wis. 362, 29 N.W.2d 730 (1947).

1191. 251 Wis. at 371, 29 N.W.2d at 735 (emphasis added). See also *Disabled Police Veterans Club v. Long*, 279 S.W.2d 220, 223 (Mo. 1955); *Conover v. Board of Educ.*, 1 Utah 2d 375, 377, 267 P.2d 768, 770 (1954).

1192. *Linder v. Eckard*, 261 Iowa 216, 220, 152 N.W.2d 833, 836 (1967) (applying IOWA CODE ANN. § 622.46 (1950), as amended, IOWA CODE ANN. § 68A (1973)). See Note, *Iowa's Freedom of Information Act: Everything You've Always Wanted To Know About Public Records But Were Afraid To Ask*, 57 IOWA L. REV. 1163, 1168 (1972). The court in *Linder* considered but rejected the broader definition of public records stated in *MacEwan v. Holm*, 226 Ore. 27, 359 P.2d 413 (1961), adopting instead "the narrower and more prevalent view." 261 Iowa at —, 152 N.W.2d at 836. The *MacEwan* definition is set out in the text at note 1194 *infra*.

1193. 226 Ore. 27, 359 P.2d 413 (1961).

1194. 226 Ore. at 43, 359 P.2d at 420 (emphasis added).

the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully, and competently performing their function as public servants."¹¹⁹⁵

Unlike Oregon, most states have included a definition of public records in their open-records statutes. Several states have adopted the common-law definition that limits public records to those records required by law to be kept.¹¹⁹⁶ Such a definition was the focus of recent litigation arising under the Arkansas "Freedom of Information Act."¹¹⁹⁷ Although the Arkansas act broadly defines public records,¹¹⁹⁸ it limits the right of inspection to those records required to be kept or maintained.¹¹⁹⁹ In interpreting this statute, the court noted:

the Freedom of Information Act *does not itself provide that any particular records shall be kept*; it only provides that records which are required by some statute (other than the Freedom of Information Act) to be made and kept, shall be open to public inspection. There is no semblance of ambiguity in this provision . . . [;] the Freedom of Information Act, as far as inspection of records is concerned, applies only to those records which by statute are required to be kept and maintained.¹²⁰⁰

Most states, however, have adopted broadened definitions of public records, thus significantly expanding the right of inspection. The open-records laws in these states can be divided into two categories:¹²⁰¹ the first defines public records in terms of the source of

1195. 226 Ore. at 38, 359 P.2d at 418. *See also* People *ex rel.* Hamer v. Board of Educ., 130 Ill. App. 2d 592, 596, 264 N.E.2d 420, 423 (1970) (discussing the "general desirability" of a policy permitting inspection of any documents that had been "acted upon").

1196. *See, e.g.*, KAN. STAT. ANN. § 45-201 (1973); N.J. STAT. ANN. § 47:1A-2 (Supp. 1974); OHIO REV. CODE ANN. § 149.43 (Page 1969); OKLA. STAT. ANN. tit. 51, § 24 (1962); S.D. COMP. LAWS ANN. § 1-27.1 (1974). *See also* ARK. STAT. ANN. §§ 12-2803 to -04 (1968), discussed in the text at notes 1197-200 *infra*. The South Carolina statute defines "public records" to include records required to be kept, but does not restrict access to only such records. *See* S.C. CODE ANN. § 1-20.1-2 (Supp. 1974). *See also* HAWAII REV. STAT. § 92-1 (1968).

1197. *See* McMahan v. Board of Trustees of the Univ. of Ark., 255 Ark. 108, 499 S.W.2d 56 (1973).

1198. "'Public records' are records made, maintained or kept by any public or governmental body, board, bureau, commission, or agency of the State or any political subdivision of the State, or organization, corporation or agency, supported in whole or in part by public funds, or expending public funds." ARK. STAT. ANN. § 12-2803 (1968).

1199. "Except as otherwise specifically provided by [law], all state, county, township, municipal and school district records which by law are required to be kept and maintained shall be open to inspection and copying by any citizen of the State of Arkansas" ARK. STAT. ANN. § 12-2803 (1968).

1200. 255 Ark. at 111, 499 S.W.2d at 58 (emphasis original).

1201. There are, of course, statutory definitions that are not susceptible to such categorization. For example, the Pennsylvania statute specifically limits the substantive

the materials, while the second focuses on content. The Florida act is an example of the first type of statute. It defines public records to include "[a]ll records made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."¹²⁰² The Florida attorney general has interpreted this provision to be a significant broadening of the common-law definition: "[I]t is not unreasonable to conclude that the Legislature added to the definition the words 'or in connection with the transaction of official business by any agency' for the purpose of including *all* correspondence and reports that were made or received by a public agency in connection with an official transaction, and not just the official document memorializing the transaction, such as a contract, deed or mortgage."¹²⁰³ Although this interpretation is quite expansive, it demonstrates some potential weaknesses in the Florida definition. First, the interpretation seems to exclude records of "unofficial" transactions,¹²⁰⁴ which may well be of significant interest to the public. Second, the statement to the effect that it was not unreasonable to interpret the statutory definition this broadly suggests that there is no statutory mandate to do so. Thus, courts could conceivably narrow this interpretation in the future.

The second type of statute generally defines public records in terms of their informational content.¹²⁰⁵ The Washington act is an

nature of the records that are required to be disclosed. *See* PA. STAT. ANN. tit. 65, § 66.1(2) (Supp. 1974). Although the Illinois statute defines public records broadly, *see* ILL. REV. STAT. ch. 116, § 43.5 (Supp. 1974), the access provision is considerably more limited in scope. *See* ILL. REV. STAT. ch. 116, § 43.7 (1973).

1202. FLA. STAT. ANN. § 119.011(1) (Supp. 1974). For similar definitions *see* ALA. CODE tit. 55, § 289(6) (1960); COLO. REV. STAT. ANN. § 24-72-202(2) (1973); CONN. GEN. STAT. ANN. § 1-19 (Supp. 1975); HAWAII REV. STAT. § 92-1 (1968); LA. REV. STAT. ANN. § 44:1(A) (West Supp. 1975); MD. ANN. CODE art. 76A, § 1(a) (Supp. 1974); MASS. ANN. LAWS ch. 4, § 7(26) (Supp. 1974); MINN. STAT. ANN. § 15.17(1) (1967); N.C. GEN. STAT. § 132-1 (1974); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3 (Supp. 1974); VA. CODE ANN. § 2.1-341(b) (Supp. 1974). (Prior to 1974, the definition of public records in the Virginia statute was very limited. *See* Act of April 4, 1968, ch. 479, § 2(b), [1968] Va. Acts of Assembly 691.); WYO. STAT. ANN. § 9-692.1(a) (Supp. 1973). *See also* Model FOIA, *supra* note 1169, § 2(C).

1203. Fla. Atty. Gen. Op. No. 071-243, at 2-3 (Aug. 17, 1971) (emphasis original). *See also* Fla. Atty. Gen. Op. No. 074-215, at 2 (July 24, 1974) (commenting on the effect of the 1967 amendments).

1204. The Minnesota statute, MINN. STAT. ANN. § 15.17 (1967), has been similarly interpreted. It defines as public records, and requires state and local officials to make and keep "all records necessary to a full and accurate knowledge of their official activities." In *Kottschade v. Lundberg*, 280 Minn. 501, 160 N.W.2d 135 (1968), the court observed that the definition, read literally, seemed to be boundless, including every "casual jotting" of any official. 280 Minn. at 504, 160 N.W.2d at 137. Faced with the necessity of placing some "reasonable limits" on the statutory definition, the court decided that only "official actions as distinguished from thought processes" constituted "official activities." It followed that "all that need be kept of record is information pertaining to an official decision, and not information relating to the process by which such a decision was reached." 280 Minn. at 505, 160 N.W.2d at 139.

1205. *E.g.*, CAL. GOVT. CODE § 6252(d) (West Supp. 1975); ORE. REV. STAT. § 192.410(4) (1974); S.C. CODE ANN. § 1-20.1 (Supp. 1973).

example. Its definition covers "[a]ny writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics."¹²⁰⁶ This seems to include a broader range of materials than the Florida-type statutes and apparently minimizes the potential for restrictive interpretations.

b. *Exemptions.* Once it has been determined that the materials being sought are included within the definition of public records, the problem remains of determining whether these records are exempt from inspection.¹²⁰⁷ The right of inspection can be defeated as effectively by broad exemptions from disclosure as it can by narrow definitions of public records. The general rule of exemption at common law has been stated as follows: "[T]he records in public offices which are not subject to public inspection are (1) those which are not public in the legal sense, but are non-public, private, secret, privileged or confidential because of their nature or stated considerations of public policy and (2) those which, though public in the legal sense, are withheld from such inspection based on stated considerations of public policy."¹²⁰⁸ These exemptions from disclosure are the products of a judicially administered balancing test¹²⁰⁹ that

1206. WASH. REV. CODE § 42.17.020(24) (1974). See Wash. Atty. Gen. Op. No. 99, at 7 (Oct. 15, 1973): "[I]t is not the presence or absence of a requirement of maintenance of a particular record by a public agency that gives rise to a right of access or inspection and copying; instead, it is the *content* of the record which is determinative of whether or not the various requirements of the initiative apply." (Emphasis original.) The Washington act also specifically includes the following documents within its definition of public records open to inspection: "Correspondence and materials referred to therein by and with the agency relating to any regulatory, supervisory or enforcement responsibilities of the agency whereby agency determines or opines upon, or is asked to determine or opine upon the rights of the state, the public . . . or of any private party." *Id.*

1207. See, e.g., *Gannett Co. v. Goldtrap*, 302 S.2d 174, 175 (Fla. Dist. Ct. App. 1974). A further problem may arise if only part of a particular document is exempted from disclosure. The question is then whether the entire document should be withheld or whether deletions can be made to enable part of the document to be disclosed. Cf. text at notes 501-05 *supra*. Some state statutes include a provision governing such cases. See, e.g., ORE. REV. STAT. § 192.500(3) (1974). See also WASH. REV. CODE § 42.17.310(2) (1974); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 2(2) (Supp. 1974) (implying that portions of materials containing public information must be severed and disclosed); Model FOIA, *supra* note 1169, § 4(B).

1208. H. CROSS, *supra* note 1168, at 75. For general discussion, see *id.* 75-91.

1209. The initial determination at the agency level of whether or not to disclose may also involve the application of a balancing test:

The duty of first determining that the harmful effect upon the public interest of permitting inspection outweighs the benefit to be gained by granting inspection rests upon the public officer having custody of the record or document sought to be inspected. If he determines that permitting inspection would result in harm to the public interest which outweighs any benefit that would result from granting inspection, it is incumbent upon him to refuse the demand for inspection"
State *ex rel.* Youmans v. Owens, 28 Wis. 2d 672, 682, 137 N.W.2d 470, 475 (1965).

requires the courts to weigh the importance of public access against the harm that might result from disclosure.¹²¹⁰

In most of the states where the right of inspection is governed by statute, the legislatures have adopted specific statutory exemptions.¹²¹¹ The majority of these states have some provision exempting records that are deemed by other laws to be privileged, confidential, or prohibited from disclosure.¹²¹² Some states exempt only records that are prohibited from disclosure by other laws.¹²¹³ Other states are less specific and grant exemptions for records as "otherwise provided" by law.¹²¹⁴ This type of exemption may cover records that are

1210. See, Comment, *Access to Government Information in California*, 54 CALIF. L. REV. 1650, 1665 (1966); *Overview, supra* note 1180, at 238-39.

1211. These exemptions generally parallel those of the federal FOIA. See text at notes 506-846 *supra*.

1212. See, e.g., ALA. CODE tit. 41, § 145 (1959); CAL. GOVT. CODE § 6254(k) (West Supp. 1975); COLO. REV. STAT. ANN. § 24-72-204 (1973); CONN. GEN. STAT. ANN. § 1-19 (Supp. 1975); FLA. STAT. ANN. § 119.07(2)(a) (Supp. 1974); GA. CODE ANN. § 40-2701 (Supp. 1974); HAWAII REV. STAT. § 92-4 (1968); IND. CODE § 5-14-1-5 (1971); MD. ANN. CODE art. 76A, § 1 (Supp. 1974); MO. REV. STAT. § 109.180 (1969); NEV. REV. STAT. § 239.010 (1973); N.H. REV. STAT. ANN. § 91-A:4 (Supp. 1973); N.J. STAT. ANN. § 47:1A-2 (Supp. 1974); N.M. STAT. ANN. § 71-5-1(D) (Supp. 1973); OHIO REV. CODE ANN. § 149.43 (Page 1969); OKLA. STAT. ANN. tit. 51, § 24 (1962); PA. STAT. ANN. tit. 65, § 66.1(2) (Supp. 1974); S.C. CODE ANN. § 1-20.2 (Supp. 1973); TENN. CODE ANN. § 15-304 (1973); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(1) (Supp. 1974); WYO. STAT. ANN. § 9-692.1-3 (Supp. 1973). See Model FOIA, *supra* note 1169, § 4(A)(4). The Oregon act includes a unique provision containing an exhaustive list of all other statutes of that state exempting records from disclosure. See ORE. REV. STAT. § 192.500(2)(h) (1974).

Some states permit the Governor to exempt records from public disclosure by executive order. See, e.g., N.J. STAT. ANN. § 47:1A-2 (Supp. 1974); ORE. REV. STAT. § 192.500(4) (1974). But see *Irval Realty Inc. v. Board of Pub. Util. Commrs.*, 61 N.J. 366, 294 A.2d 425 (1972), in which the court took a very restrictive view of the Governor's statutory authority to order the withholding of public records. The court held that "the power was intended to be exercised only when necessary for the protection of the public interest." 61 N.J. at 374, 294 A.2d at 429.

1213. See, e.g., ALAS. STAT. § 09.25.120(4) (1962); COLO. REV. STAT. ANN. § 24-72-204 (1973); FLA. STAT. ANN. § 119.07(2)(a) (Supp. 1974); GA. CODE ANN. § 40-2701 (Supp. 1974); HAWAII REV. STAT. § 92-4 (1968); KAN. STAT. ANN. § 45-201 (1973); MD. ANN. CODE art. 76A, § 3(a) (Supp. 1974); N.H. REV. STAT. ANN. § 91-A:4 (Supp. 1973); OHIO REV. CODE ANN. § 149.43 (Page 1969); OKLA. STAT. ANN. tit. 51, § 24 (1962); ORE. REV. STAT. § 192.500(g)(h) (1974); PA. STAT. ANN. tit. 60, § 66.1 (Supp. 1974); S.D. COMP. LAWS ANN. § 1-27-3 (1974); WYO. STAT. ANN. § 9-692.3(a) (Supp. 1973).

Several states exempt records deemed confidential by law. See, e.g., IND. CODE § 5-14-1-5 (1971); NEV. REV. STAT. § 239.010 (1973); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(1) (Supp. 1974). The scope of the two types of exemptions is probably the same.

1214. Statutes that contain one of the various formulations of the "otherwise provided" language include ALA. CODE tit. 41, § 145 (1959); ARK. STAT. ANN. § 12-2804 (1968); CONN. GEN. STAT. ANN. § 1-19 (Supp. 1975); MINN. STAT. ANN. § 15.17(4) (1967), as amended, (Supp. 1974); MO. ANN. STAT. § 109.180 (1966); NEB. REV. STAT. § 84-712 (1971); N.J. STAT. ANN. § 47:1A-2 (Supp. 1974); N.M. STAT. ANN. § 71-5-1(D) (Supp. 1973); N.Y. PUB. OFFICERS LAW § 88.7(a) (McKinney Supp. 1974); N.D. CENT. CODE § 44-04-18 (1960); S.C. CODE ANN. § 1-20.2 (Supp. 1973); TENN. CODE ANN. § 15-304

merely permitted to be kept secret by other laws, as well as those that are prohibited from disclosure. Exempting only the latter records seems preferable. Unless specific laws prohibit the disclosure of certain records, those records should be open to public scrutiny.¹²¹⁵

The majority of the states that have adopted statutory exemptions also recognize various substantive exemptions, which vary greatly in number, specificity, and content.¹²¹⁶ These exemptions represent legislative determinations that in certain situations the public interest in disclosure is outweighed by one or more competing interests.¹²¹⁷ The vast majority of states exempt specific types of records, the disclosure of which would constitute an invasion of personal privacy¹²¹⁸ or an "unwarranted" invasion of privacy.¹²¹⁹

(1973); VA. CODE ANN. § 2.1-342 (1973), *as amended*, (Supp. 1974); WIS. STAT. ANN. § 19-21(2) (1972). The statutes in Iowa, IOWA CODE § 68A.2 (1971), California, CAL. GOVT. CODE § 6254 (West Supp. 1975), and Massachusetts, MASS. ANN. LAWS ch. 4, § 7(26)(a) (Supp. 1974), contain exemptions that do not employ "otherwise provided" language but seem to be substantially similar.

1215. *But cf.* FAA v. Robertson, 43 U.S.L.W. 4833 (U.S. June 24, 1975).

1216. Statutory exemptions are usually permissive rather than mandatory; an agency generally has the authority to allow inspection in cases where the records can be exempted from disclosure. *See* Black Panther Party v. Kehoe, 42 Cal. App. 3d 635, 656, 117 Cal. Rptr. 106, 113 (1974). *But see* COLO. REV. STAT. ANN. § 24-72-204 (1973); MD. ANN. CODE art. 76A, § 3 (Supp. 1974); WYO. STAT. ANN. § 9-692.3 (Supp. 1973). These statutes distinguish mandatory exemptions, designed to protect individual privacy, from permissive exemptions, designed to protect the interests of the state. *See* note 1707 *infra* and accompanying text. Section 3(c) of the Texas act, TEX. REV. CIV. STAT. ANN. art. 6252-17a (Supp. 1974), specifically gives the custodian discretion to disclose certain categories of records. This seems to imply that as to other categories of records, there is no such discretion. Section 10 of that article specifically proscribes the distribution of information deemed confidential.

1217. For an excellent discussion of the policies underlying the exemptions in the Oregon Act, *see* 36 OP. ORE. ATTY. GEN. 543, 556-63 (1973).

1218. *See, e.g.*, ALAS. STAT. § 09.25.120 (1962) (vital statistics, adoption proceedings, juvenile records, medical and public health records); ARK. STAT. ANN. § 12-2804 (1968) (state income tax returns, medical records, scholastic records, adoption records); CAL. GOVT. CODE §§ 6254(c),(i),(n) (West Supp. 1975) (personnel and medical files, individual tax files, statements of personal worth used in licensing procedures); COLO. REV. STAT. ANN. § 24-72-204(3) (1973) (medical, psychological and sociological data, personnel files, letters of reference); CONN. GEN. STAT. ANN. § 1-19 (Supp. 1975) (personnel and medical files); GA. CODE ANN. § 40-2703 (Supp. 1974) (medical records); IOWA CODE § 68A.7 (1971) (student records, hospital and medical records, personal information in confidential personnel records); KAN. STAT. ANN. § 45-201 (1973) (juvenile records, adoption records, records of birth of illegitimate children); LA. REV. STAT. ANN. § 44:4 (West 1950) (tax returns, records relating to old-age assistance, aid to the blind and AFDC, records concerning the fitness of a person to practice medicine); MD. ANN. CODE art. 76A, § 3(c) (Supp. 1974) (medical, psychological and sociological data on individuals, adoption and welfare records, personnel files, letters of reference, hospital records, school district records on individuals, circulation records of public libraries); MASS. ANN. LAWS ch. 4, § 7(26)(c), *as amended*, (Supp. 1974) (personnel and medical files); MONT. REV. CODES ANN. § 59-512 (1970) (adoption records); N.H. REV. STAT. ANN. § 91-A:5(IV) (Supp. 1973) (personnel, medical, and welfare records); N.M. STAT. ANN. 71-5-1 (1961), *as amended*, (Supp. 1973) (records of physical and mental treatment and examination, letters of reference, letters or memos that represent matters of opinion in personnel or student files); N.Y. PUB. OFFICERS LAW § 88(3) (McKinney

Many states also shield from disclosure records containing trade secrets or other confidential commercial data¹²²⁰ and certain types of records that, if disclosed, would injure some legal or economic interest of the state.¹²²¹ Finally, other governmental interests are

Supp. 1974) (employment, medical and credit histories, personal references); OHIO REV. CODE ANN. § 149.43 (Page 1969) (physical and psychiatric examinations, adoption proceedings); OKLA. STAT. ANN. tit. 51, § 24 (1962) (income tax records); S.C. CODE ANN. § 1-20.1 (Supp. 1974) (income tax returns, medical, scholastic, and adoption records); TENN. CODE ANN. § 15-305 (1973), *as amended*, (Supp. 1974) (medical and student records); TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 3(2), (14), (15) (Supp. 1974) (personnel files, student records, birth and death records); VA. CODE ANN. § 2.1-342(b)(3) (Supp. 1974) (state income tax returns, medical and mental records, scholastic and personnel records); WASH. REV. CODE §§ 42.17.310(a), (b), (c) (1974) (personal information regarding students, patients, welfare recipients, prisoners, probationers, parolees, or employees of public agencies, and taxpayer information); WYO. STAT. ANN. § 9-692.3(d) (Supp. 1973) (medical, psychological, and sociological data on individuals, individual welfare and adoption records, personnel files, letters of reference, hospital and school district records).

1219. *See, e.g.*, CAL. GOVT. CODE § 6254(c) (West Supp. 1975); CONN. GEN. STAT. ANN. § 1-19 (Supp. 1974); GA. CODE ANN. § 40-2703 (Supp. 1974); HAWAII REV. STAT. § 92-1(2) (1968); N.Y. PUB. OFFICERS LAW §§ 88(3), (7)(c) (McKinney Supp. 1974); PA. STAT. ANN. tit. 65, § 66.1(2) (Supp. 1974).

Oregon exempts "[i]nformation of a personal nature . . . if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance." ORE. REV. STAT. § 192.500(2)(b) (1974). The Montana constitution, art. II, § 9, provides for the public right of access to public records "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." An Illinois provision states that "[n]othing in this section shall require the State to invade or assist in the invasion of a person's right to privacy." ILL. REV. STAT. ch. 116, § 43.6 (1973). *See also* Model FOIA, *supra* note 1169, § 4(A)(2); 5 U.S.C. § 552(b)(6) (1970), discussed in the text at notes 700-44 *supra*.

1220. *See, e.g.*, CAL. GOVT. CODE §§ 6254(d), (e), 6254.7(d) (West Supp. 1975); COLO. REV. STAT. ANN. § 24-72-204(3)(e) (1973); CONN. GEN. STAT. ANN. § 1-19 (Supp. 1975); IOWA CODE § 68A.7(3) (1971); LA. REV. STAT. ANN. § 44:4(3)-(5) (West 1950); MD. ANN. CODE art. 76A, § 3(c)(v) (Supp. 1974); MASS. ANN. LAWS ch. 4, § 7(26)(g) (Supp. 1974); N.H. REV. STAT. ANN. § 91-A:5(IV) (Supp. 1973); ORE. REV. STAT. §§ 192.500(1)(b), (e), (2)(e) (1974); TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 3(10), (13) (Supp. 1974); WYO. STAT. ANN. § 9-692.3(d)(v) (Supp. 1973). *See also* Model FOIA, *supra* note 1169, § 4(A)(1); 5 U.S.C. § 552(b)(4) (1970), discussed in the text at notes 611-47 *supra*.

1221. *See, e.g.*, CAL. GOVT. CODE §§ 6254(b), (h) (West Supp. 1975) (records pertaining to pending litigation to which an agency is a party, appraisals regarding prospective public acquisition of land and other contracts); COLO. REV. STAT. ANN. § 24-72-204(2)(a)(iv), (v) (1973) (specific details of bona fide research projects being conducted by a state institution, real estate appraisals regarding the acquisition of property by the state); HAWAII REV. STAT. § 92-4 (1968) (permitting the Attorney General and district attorneys to withhold records in their offices pertaining to the preparation of the prosecution or defense of any action); IOWA CODE §§ 68A.7(4), (6), (7), (8) (1971) (work products of attorneys related to litigation by or against a public body, reports to government agencies that, if released, would give advantage to competitors and serve no public purpose, appraisal information concerning purchase for public purpose, information on industrial negotiations of the Development Commission); MD. ANN. CODE art. 76A, §§ 3(b)(iii), (iv) (Supp. 1974) (specific details of bona fide research projects conducted by state institutions, real estate appraisals); MASS. ANN. LAWS ch. 4, §§ 7(26)(h), (i), (Supp. 1974) (proposals and bids to enter into contracts or agreements, appraisals of real estate); ORE. REV. STAT. §§ 192.500(1)(a), (f) (1974) (litigation involving a public body, information relating to real estate appraisal); TEX. REV. CIV. STAT.

protected in many states by exemptions for intra- or inter-agency memoranda and correspondence¹²²² and/or investigatory files and records.¹²²³

In addition to these specific categories of exemptions,¹²²⁴ several states have included in their statutes a general "withholding" exemption.¹²²⁵ In *Black Panther Party v. Kehoe*, the California court

ANN. art. 6252-17a, §§ 3(3), (4), (5) (Supp. 1974) (information relating to agency litigation or settlement negotiations, information that would give advantage to competitors or bidders, information pertaining to the location of property prior to formal announcement or contract awards); VA. CODE ANN. § 2.1-342(b)(5) (Supp. 1974) (records pertaining to litigation involving a public body); WASH. REV. CODE §§ 42.17.310(1)(g), (h), (j) (1974) (real estate appraisals relating to the acquisition of property, valuable formulas, research data, etc., obtained by an agency, the disclosure of which would produce private gain and public loss, records relevant to a controversy to which the agency is a party that would not be accessible by discovery); WYO. STAT. ANN. §§ 9-692.3(b)(iii), (iv) (Supp. 1973) (specific details of bona fide research projects conducted by state institutions, real estate appraisals).

1222. See, e.g., CONN. GEN. STAT. ANN. § 1-19 (Supp. 1975); MD. ANN. CODE art. 76A, § 3(b)(v) (Supp. 1974); MASS. ANN. LAWS ch. 4, § 7(26)(d) (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(11) (Supp. 1974); WASH. REV. CODE § 42.17.310(1)(i) (1974); WYO. STAT. ANN. § 9-692.3(b)(v) (Supp. 1973). Oregon exempts "[c]ommunications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action." ORE. REV. STAT. § 192.500(2)(a) (1974). However, this exemption is not applicable "unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure." ORE. REV. STAT. § 192.500(2)(a) (1974). California restricts its exemption to cases in which "the public interest in withholding such records clearly outweighs the public interest in disclosure." CAL. GOVT. CODE § 6254(a) (West Supp. 1975). See also 5 U.S.C. § 552(b)(5) (1970), discussed in the text at notes 648-99 *supra*.

The rationale underlying these exemptions seems to conflict with that underlying open-meeting laws, thus casting serious doubt on the desirability of these exemptions. See text at notes 1305-498 *infra*.

1223. See, e.g., CAL. GOVT. CODE § 6254(f) (West Supp. 1975); COLO. REV. STAT. ANN. § 24-72-204(2)(a)(ii) (1973); CONN. GEN. STAT. ANN. § 1-19 (Supp. 1975); IOWA CODE § 68A.7(5) (1971); LA. REV. STAT. ANN. § 44:3 (West Supp. 1975); N.J. STAT. ANN. § 47:1A-3 (Supp. 1974); ORE. REV. STAT. §§ 192.500(1)(c), (h) (1974); PA. STAT. ANN. tit. 65, § 66.1(2) (Supp. 1974); TENN. CODE ANN. § 15-305 (1973); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(8) (Supp. 1974); VA. CODE ANN. § 2.1-342(b)(1), (2) (Supp. 1974); WASH. REV. CODE § 42.17.310(1)(d) (1974); WYO. STAT. ANN. § 9-692.3(b)(i) (Supp. 1973). See also Model FOIA, *supra* note 1169, § 4(A)(3); 5 U.S.C.A. § 552(b) (7) (Supp. Feb. 1975), discussed in the text at notes 745-828 *supra*.

1224. There are various specific exemptions in the state acts that are not susceptible to meaningful categorization. Several states, for example, exempt records of parole and pardon boards. See N.H. REV. STAT. ANN. § 91-A:5(II) (Supp. 1973); OHIO REV. CODE ANN. § 149.43 (Page 1969); ORE. REV. STAT. § 192.500(2)(d) (1974); VA. CODE ANN. § 2.1-345(5) (Supp. 1974). Some states exempt certain library and museum materials. See CAL. GOVT. CODE § 6254(j) (West Supp. 1975); COLO. REV. STAT. ANN. § 24-72-204(3)(f) (1973); MD. ANN. CODE art. 76A, § 3(c)(vi) (Supp. 1974); WYO. STAT. ANN. § 9-692.3(d)(vi) (Supp. 1974). A number of states also exempt test questions and answer keys. See CAL. GOVT. CODE § 6254(g) (West Supp. 1975); COLO. REV. STAT. ANN. § 24-72-204(2)(a)(iii) (1973); MD. ANN. CODE art. 76A, § 3(b)(ii) (Supp. 1974); ORE. REV. STAT. § 192.500(1)(d) (1974); WASH. REV. CODE § 42.17.310(1)(f) (1974); WYO. STAT. ANN. § 9-692.3(b)(ii) (Supp. 1973).

1225. See, e.g., CAL. GOVT. CODE § 6255 (West Supp. 1975); IOWA CODE ANN. § 68A.8

of appeals described such an exemption as follows: "The Public Records Act recognizes that fixed statutory categories do not always respond to real-life situations. Thus, aside from the 14 exempt categories listed in section 6254, section 6255 provides a residual exemption where, on the facts of the particular case, the public interest served by not making the record public clearly outweighs the public interest served by its disclosure."¹²²⁶

A residual exemption, such as the one referred to in *Kehoe*, compels a court to balance the competing interests in order to determine whether specific records should be disclosed. This weighing is similar to the judicial function a court performs when faced with a claim of exemption under the common law.¹²²⁷ There is a significant distinction between this general residual statutory exemption and the common-law test, however: The exemption establishes a presumption in favor of disclosure by requiring a *clear* demonstration that the public interest in disclosure is outweighed by another interest in the particular case.¹²²⁸

Some states have adopted more restrictive residual exemptions that require a finding of "substantial injury to the public interest" as a condition of withholding records.¹²²⁹ The custodian of such records must obtain a court order before the records qualify for the exemption. Such provisions place a significant burden on an agency seeking to withhold records. Not only must it sustain the burden of proof,¹²³⁰ it must also initiate a judicial proceeding in order to

(1973); S.C. CODE ANN. § 1.20.1 (Supp. 1973). This type of exemption has no parallel in the federal FOIA.

1226. 39 Cal. App. 3d 900, 907, 114 Cal. Rptr. 725, 729 (1974). CAL. GOVT. CODE § 6255 (West Supp. 1975), at issue in this case, allows an agency to withhold "any record by demonstrating that . . . on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."

1227. See text at notes 1209-12 *supra*.

1228. See, e.g., IOWA CODE § 68A.8 (1971), which permits the invocation of such an exemption "[i]f the court finds that such examination would clearly not be in the public interest and would substantially and irreparably injure any person or persons. The district court shall take into account the policy of this chapter that free and open examination of public records is generally in the public interest . . ." Cf. note 1212 *supra* (discussing the statutory authority of the Governor to order the withholding of records). The clear demonstration necessary for the application of a residual exemption was made in *Yarish v. Nelson*, 27 Cal. App. 3d 893, 104 Cal. Rptr. 205 (1972).

1229. See, e.g., COLO. REV. STAT. ANN. § 24-72-204(6) (1973); MD. ANN. CODE art. 76A, § 3(f) (Supp. 1974); WYO. STAT. ANN. § 9-692.3(g) (Supp. 1973).

1230. See, e.g., *Meriden Record Co. v. Browning*, 6 Conn. Cir. 633, —, 294 A.2d 646, 649 (1971), in which the court, quoting an earlier case, required a showing by the agency that "such a protection of the records being shielded from scrutiny . . . [is] vital to public security." (Emphasis added.) The court seemed to increase significantly the presumption in favor of disclosure, since the exemption clause in question provided that a custodian shall refuse permission if the inspection or copying of particular records "would adversely affect the public security." CONN. GEN. STAT. ANN. § 1-20 (1969).

invoke the exemption. These safeguards minimize the chance that the residual exemptions will be abused.

Specific statutory exemptions are legislative attempts to predetermine the results of the balancing test on a categorical basis. However, such predeterminations may allow records to be withheld in situations where no persuasive reason exists for making them unavailable.¹²³¹ In response to this problem, several states have added provisos to specific exemptions that state that the exemptions are not always to be determinative. Thus, the Oregon act states that exempted records should be disclosed if "the public interest requires disclosure in the particular instance."¹²³² Similarly, the Iowa¹²³³ and Washington¹²³⁴ statutes allow a court to order disclosure notwithstanding the existence of otherwise applicable exemptions.¹²³⁵

In the absence of a "public interest" provision, a court is not necessarily precluded from overriding a legitimate claim of exemption. There is authority for the proposition that a balancing test should be applied even when the requested information falls within a specific exemption.¹²³⁶ In one opinion, the California Attorney General stated:

The same historical evidence which compels the conclusion that the California Public Records Act should be construed broadly also compels the conclusion that these two sections must be construed strictly so as not to interfere with the basic policy of the act. The specific exceptions of section 6254 should be viewed with the general philosophy of section 6255 in mind; that is, that records should be withheld from disclosure only where the public interest served by not making a record public outweighs the public interest served by the general policy of disclosure.¹²³⁷

1231. Cf. Wash. Atty. Gen. Op. No. 4 at 12 (Jan. 19, 1973): "As you will note from a reading of the full text of the initiative, its drafters did not define or otherwise state specific standards outlining the right of personal privacy—in apparent recognition of the uniqueness of that right to each individual or entity which might wish to raise it in opposition to the disclosure of a particular record. Instead, they appropriately left it to the court to protect that personal right on a case-by-case basis as it is individually invoked"

1232. ORE. REV. STAT. § 192.500(1) (1974). See *Papadopoulos v. State Bd. of Higher Educ.*, 8 Ore. App. 445, 494 P.2d 260 (1972). In response to a claim of exemption based on a statute that arguably protected certain documents "when the public interest would suffer by the disclosure," 8 Ore. App. at —, 494 P.2d at 262, the court held: "The evidence does not establish that keeping the promise of secrecy outweighs the citizens' rights to know the contents of this public record. Nor does the evidence establish that it will be significantly more difficult to obtain similar information in the future, absent assurances of permanent secrecy." 8 Ore. App. at —, 494 P.2d at 270.

1233. IOWA CODE § 68A.7 (1971).

1234. WASH. REV. CODE § 42.17.310(3) (1974).

1235. Although the federal act does not contain such a provision, it may permit agencies to release information falling within an exemption. See text at notes 1141-51 *supra*.

1236. See *Uribe v. Howie*, 19 Cal. App. 3d 194, 206, 96 Cal. Rptr. 493, 500 (1971).

1237. 53 OP. CAL. ATTY. GEN. 136, 143 (1970). The sections construed are CAL. GOVT.

This interpretation furthers the basic policy of "freedom of information," which is that *all* public records should be available *unless* the public interest requires otherwise; however, it may be contrary to the legislative intent to preclude judicial discretion in cases where exemptions apply.

In the absence of particular statutory language enabling the courts to balance the public interest in disclosure against the public interest protected by the exemption, they will probably adhere to the statutory guidelines.¹²³⁸ In order to effectuate fully the policy of freedom of information, it is arguably desirable for the legislative categories to be viewed as merely presumptive exemptions.¹²³⁹ Thus, a court should be able to order the disclosure of exempted records when the public interest in freedom of information substantially outweighs the legislatively favored interest expressed in the exemption.¹²⁴⁰

c. *Persons who can invoke the right of inspection.* The third important element that bears on the scope of the public right of inspection is the class of persons that can invoke the right.¹²⁴¹ Most states currently have statutes that make the right of inspection available to "any person."¹²⁴² The courts generally construe these provi-

CODE §§ 6254-55 (West Supp. 1975) (the former section has been amended since the Attorney General's opinion). See also Note, *supra* note 1192, at 1175.

1238. In construing the federal act's exemption scheme, the courts have generally not looked beyond the initial determination whether the exemption claimed does apply. See text at notes 496-500 *supra*. The only exception to this practice has been with regard to the exemption for personal privacy, 5 U.S.C. § 552(b)(6) (1970), which includes the word "unwarranted." See text at notes 700-44 *supra*.

1239. The related proposition that a court could create exemptions other than those specified by the legislature would be inconsistent with the fundamental policy of freedom of information. See text at notes 1105-31 *supra*.

If the courts are given the authority to balance the countervailing interests in cases where an exemption is found to be applicable, it is important that they be allowed to review the matter *de novo*, rather than be restricted to a review of the agency's balancing determination. See text at notes 1268-70 *infra*.

1240. Cf. text at notes 1156-59 *supra*.

1241. This question of the class of persons to whom the right of inspection extends does not arise at the federal level. The federal act grants access "to any person" who requests it. 5 U.S.C.A. § 552(a)(3) (Supp. Feb. 1975). This provision was explicitly intended to prevent the imposition of any requirement that the requesting party establish his "need to know." See note 458 *supra* and accompanying text.

1242. See, e.g., ARIZ. REV. STAT. ANN. § 39-121 (1956); NEB. REV. STAT. § 84-712 (1971) ("all citizens of this state, and all other persons interested in the examination of the public records"); ORE. REV. STAT. § 192.420 (1974) ("every person"); S.D. COMP. LAWS ANN. § 1-27-1 (1974). TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3 (Supp. 1974) simply states that public information shall be "available to the public." See also Model FOIA, *supra* note 1169, § 3(A).

Some states limit the right of inspection to citizens only. See, e.g., ALA. CODE tit. 41, § 145 (1959); FLA. STAT. ANN. § 119.01 (Supp. 1974); GA. CODE ANN. § 40-2701 (Supp. 1974); IDAHO CODE § 59-1009 (1948); IND. CODE § 5-14-1-3 (1971); ME. REV. STAT. ANN. ch. 1, § 405 (1964); N.H. REV. STAT. ANN. § 91-A:4 (Supp. 1973); N.M. STAT. ANN. § 71-5-1 (Supp. 1973); UTAH CODE ANN. § 78-26-2 (1953). The Virginia statute originally contained an "interest requirement." See Act of April 4, 1968, ch. 479, § 3(a), [1968]

sions literally and require no showing of special interest or proper purpose.¹²⁴³ *Mans v. Lebanon School Board*,¹²⁴⁴ a New Hampshire case, typifies this approach: "One consideration not relevant to our inquiry is the plaintiff's lack of a sufficient personal reason for seeking the information. At common law a court might deny access to information if it thought plaintiff's reasons whimsical or antisocial. . . . Our statute grants rights to 'every citizen.' . . . Plaintiff's rights under [the act] do not depend upon his demonstrating a need for the information."¹²⁴⁵

Although these statutes have obviated the common-law standards governing who can invoke the right of inspection, it is nevertheless important to examine those standards. First, such an examination will lead to an understanding of why some courts have confused the question of standing to invoke the right of inspection with that of standing to enforce the right. Second, it will demonstrate the radical change that open-records statutes have effected in this area.

At common law, only a very limited class of persons could invoke the right to inspect public records.¹²⁴⁶ In order to gain access to public records, a person had to demonstrate some legally recognized "interest" therein. The earliest and most restrictive interest recognized was adopted from the narrow English rule.¹²⁴⁷ One court characterized this interest as follows: "[T]his court recognizes the common-law right of inspection of public records by a proper person or his agent provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information."¹²⁴⁸ This narrow rule has been criticized as a misapplication of the English law. In the Michigan case of *Nowack v. Auditor General*,¹²⁴⁹ the court stated that this limitation was not intended to restrict the right of inspection; rather it was intended to limit the

Va. Acts of Assembly 691. Now, however, Virginia allows inspection by "any citizen of this state." VA. CODE ANN. § 2.1-342 (Supp. 1974).

1243. See, e.g., *Denver Publishing Co. v. Dreyfus*, — Colo. —, —, 520 P.2d 104, 106 (1974); *Citizens for Better Educ. v. Board of Educ.*, 124 N.J. Super. 523, 528, 308 A.2d 35, 37 (App. Div. 1973); *Minneapolis Star & Tribune Co. v. State*, 282 Minn. 86, 89-90, 163 N.W. 2d 46, 48 (1968); *State ex rel. Journal Co. v. County Court*, 43 Wis. 2d 297, 309, 168 N.W.2d 836, 841 (1969).

1244. 112 N.H. 160, 290 A.2d 866 (1972).

1245. 112 N.H. at 162, 290 A.2d at 867.

1246. See H. CROSS, *supra* note 1168, at 25-29.

1247. See *Nowack v. Auditor Gen.*, 243 Mich. 200, 204-06, 219 N.W. 749, 750-51 (1928).

1248. *Nolan v. McCoy*, 77 R.I. 96, 103, 73 A.2d 693, 697 (1950). See also *State ex rel. Holloran v. McGrath*, 104 Mont. 490, 497, 67 P.2d 838, 841 (1937).

1249. 243 Mich. 200, 219 N.W. 749 (1928).

class able to enforce that right by means of a writ of mandamus.¹²⁵⁰
The court said:

The [English] courts held that, to entitle [a party] to the writ, his interest must be direct and tangible, and that the right to inspect public records to secure evidence for a lawsuit was such an interest. By this the courts did not mean that he had no right to inspect the books unless he wanted to use them as evidence, but they meant that they would not issue the extraordinary writ of mandamus to *enforce* a private right of inspection unless the purpose was to use it in some pending or prospective suit.¹²⁵¹

American courts have generally broadened this prerequisite to the right of inspection, although many continue to require a showing of some type of interest.¹²⁵² In these states, cases have often turned on the question whether a citizen's "public interest" is sufficient to afford him the right of inspection without a showing of any private interest.¹²⁵³ Courts have generally held that the public interest alone is sufficient.¹²⁵⁴

Other states have not required the demonstration of a particular interest but have limited the right of inspection to persons having a "proper purpose." Thus, it has been held that a citizen can invoke the right of inspection "except in instances where the purpose is purely speculative or from idle curiosity, or such as to unduly interfere or hinder the discharge of the duties of [a public] officer."¹²⁵⁵ This standard is an improvement upon the "interest" requirement. However, its vagueness may offer a court an opportunity to deny the right of inspection whenever it feels that the public interest warrants nondisclosure.¹²⁵⁶ Some courts have achieved the most

1250. 243 Mich. at 203-04, 219 N.W. at 750-51. For a discussion of the common-law standing requirements to enforce the right to inspection see text at notes 1271-72 *infra*.

1251. 243 Mich. at 205-06, 219 N.W. at 751 (emphasis added).

1252. See, e.g., *Clement v. Graham*, 78 Vt. 290, 315-16, 63 A. 146, 153-54 (1906); *State ex rel. Charleston Mail Assn. v. Kelly*, 149 W. Va. 766, 770, 143 S.E.2d 136, 139 (1965).

1253. See Comment, *supra* note 1210, at 1668-69.

1254. See, e.g., *Moore v. Board of Chosen Freeholders*, 76 N.J. Super. 396, 184 A.2d 748 (App. Div.), *modified on other grounds*, 39 N.J.2d 26, 186 A.2d 676 (1962); *Nowack v. Auditor Gen.* 243 Mich. 200, 219 N.W. 749 (1928). As the court said in *State ex rel. Charleston Mail Assn. v. Kelly*, 149 W. Va. 766, 770, 143 S.E.2d 136, 139 (1965), "The petitioners . . . are citizens, voters, and taxpayers of this state and as such allege that they are interested in 'being fully informed on the activities and conduct of its government and the elected officers thereof and the handling of public monies.' It is indeed difficult to envision a greater interest in public records which reflect the handling of public funds than that of a citizen and taxpayer whose own contribution to the public funds is directly involved."

1255. *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 597, 200 S. 739, 746 (1941). See also *Payne v. Staunton*, 55 W. Va. 202, 213, 46 S.E.2d 927, 932 (1904).

1256. Cf. *People ex rel. Better Broadcasting Council, Inc. v. Keane*, 17 Ill. App. 3d 1090, 1096, 309 N.E.2d 362, 367 (1973).

desirable result by refusing to impose any restrictions upon the right of inspection.¹²⁵⁷

d. *Enforcement procedures.* Once a person establishes that he can invoke the right, at common law or under a statute, to inspect particular public records, there remains the problem of enforcing this right if access to the requested records is denied. The class of persons who have the right to inspect and the class of persons who can enforce the right of inspection are not necessarily co-extensive under state law.¹²⁵⁸ Because, as a practical matter, there is no right without a remedy, the limitations on enforcement are crucial.¹²⁵⁹

At common law, the procedure that must be used to compel an agency or public official to permit the inspection of public records is the writ of mandamus.¹²⁶⁰ It is appropriate to use mandamus to force public officials to perform ministerial duties;¹²⁶¹ generally, it has been held that the duty to allow reasonable inspection of public records is "ministerial in its nature, and so clear and specific that no element of discretion nor of official judgment is involved in its performance."¹²⁶² In the absence of a specific enforcement provision, states with open-records statutes rely on the same procedure. As the Wisconsin court stated: "Mandamus is the proper remedy to test the reasons for withholding documents or records from inspection. In Wisconsin, we have traditionally tested the right to inspection by the use of mandamus"¹²⁶³

1257. See, e.g., *Disabled Police Veterans Club v. Long*, 279 S.W.2d 220, 223 (Mo. Ct. App. 1955) ("[It is not] essential that the inspection of public records be limited to persons who have some legal interest to be subserved by the inspection. Neither does it detract from the right to inspect public records that it is done for others for compensation").

1258. See *Nowack v. Auditor Gen.*, 243 Mich. 200, 208, 219 N.W. 749, 751 (1928); *Booth Newspapers, Inc. v. Cavanaugh*, 15 Mich. App. 203, 205-06, 166 N.W.2d 546, 547 (1968).

1259. See Note, *supra* note 1192, at 1186. The federal act provides a remedy in every case in which the right of inspection under the statute is improperly denied. A minority of the courts however, relying on traditional equity principles, have refused to order disclosure of improperly withheld records in some cases. See note 1110 *supra* and accompanying text.

1260. See, e.g., *Gallagher v. Boller*, 231 Cal. App. 2d 482, 41 Cal. Rptr. 880 (1964); *State ex rel. Colescott v. King*, 154 Ind. 621, 57 N.E. 535 (1900); *Clement v. Graham*, 78 Vt. 290, 63 A. 146 (1906). See generally H. Cross, *supra* note 1168, at 30-33; Annot., 60 A.L.R. 1356 (1929), updated 169 A.L.R. 653 (1947).

1261. "[W]here the duty of a public official requires the exercise of discretion, mandamus will not be granted to control his decision But the law is equally clear that mandamus is the proper remedy to compel a public official to perform a ministerial duty in which the applicant for the writ has a sufficient interest." *Pressman v. Elgin*, 187 Md. 446, 451, 50 A.2d 560, 563 (1947).

1262. *Clement v. Graham*, 78 Vt. 290, 318, 63 A. 146, 154 (1906). See also *State ex rel. Davidson v. Couch*, 115 Fla. 115, 118, 155 S. 153, 153-54 (1934).

1263. *Beckon v. Emery*, 36 Wis. 2d 510, 518-19, 153 N.W.2d 501, 504 (1967).

Many states have specifically provided in their statutes that courts shall have jurisdiction in mandamus to review denials of the right of inspection.¹²⁶⁴ Other states allow courts to grant "injunctive relief,"¹²⁶⁵ or to "enter such orders for disclosure" as they deem appropriate,¹²⁶⁶ or to require agencies to show cause why such relief should not be granted.¹²⁶⁷ These procedures are probably equivalent to the common-law writ of mandamus. The most significant difference exists in those states that have included a provision in their statutes for de novo review of denials of the right of inspection.¹²⁶⁸ In the absence of such a provision, a court is generally limited to reviewing whether the official's decision to refuse inspection was supported by sufficient evidence.¹²⁶⁹ Under the de novo review standard, a court may determine the applicability of a claimed exemption unfettered by any presumption in favor of the legitimacy of the agency determination.¹²⁷⁰ This procedure should provide the public with more effective protection against unwarranted withholdings of public records.

The most troublesome requirement for mandamus at common law has been that of standing. In the absence of a statutory provision to the contrary, courts often require that a person petitioning for such a writ demonstrate some "special" or "beneficial" interest in the requested records.¹²⁷¹ As noted above, some courts have confused the standing requirement for enforcement with the common-law standing requirement for invocation of the right of inspection.¹²⁷² Although most states have abrogated the interest requirement for

1264. See, e.g., MASS. ANN. LAWS ch. 66, § 10(b) (Supp. 1974); NEB. REV. STAT. § 84-712.03 (1971); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 8 (Supp. 1974); VA. CODE ANN. § 2.1-346 (1973).

1265. See, e.g., CAL. GOVT. CODE § 6258 (West Supp. 1975); N.H. REV. STAT. ANN. § 91-A:1 (Supp. 1973); S.C. CODE ANN. § 1-20.4 (Supp. 1973). See also Model FOIA, *supra* note 1169, § 6(A).

1266. See, e.g., CONN. GEN. STAT. ANN. § 1-20 (Supp. 1975). See also PA. STAT. ANN. tit. 65, § 66.4 (1959).

1267. See, e.g., COLO. REV. STAT. ANN. § 24-72-204(5) (1973); MD. ANN. CODE art. 76A, § 3(e) (Supp. 1974); WYO. STAT. ANN. § 9-692.3(f) (Supp. 1973).

1268. See, e.g., CONN. GEN. STAT. ANN. § 1-19 (Supp. 1975); ORE. REV. STAT. § 192.490 (1974); WASH. REV. CODE § 42.17.340(2) (1974). See also Model FOIA, *supra* note 1169, § 6(B).

1269. See Freedom of Information Clearinghouse, Summary of State FOI Laws (n.d.) (on file with the *Michigan Law Review*). See generally, K. DAVIS, ADMINISTRATIVE LAW TEXT § 29.10 (3d ed. 1972); L. JAFFE, *supra* note 865, at 622-23.

1270. See generally K. DAVIS, *supra* note 1269, at § 29.07; L. JAFFE, *supra* note 865, at 618-23; R. Plessner & P. Petkas, *supra* note 1169, at 43. The federal act also provides for de novo review. 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975). See text at notes 962-64 *supra*.

1271. See, e.g., *Boylan v. Warren*, 39 Kan. 301, 18 P. 174 (1888).

1272. See text following note 1245 *supra*. Of course, courts can reach the same result by denying a remedy for the right of inspection as they can by denying the right itself.

the right of inspection, many still retain such a limitation on the right of enforcement.

A problem may arise when a person seeking to enforce his right to inspect public records has only a general "public interest" in obtaining those records, that is, one common to all citizens, rather than a unique personal interest.¹²⁷³ Although many courts allow a citizen to petition for mandamus to vindicate a general public interest in inspection,¹²⁷⁴ others require that, in the absence of the requisite special interest, the petition must be brought by the attorney general or another designated official.¹²⁷⁵ Thus, the Pennsylvania court held:

[W]hile the plaintiff had a statutory right of inspection, the breach of the public duty by the respondents did not result in the plaintiff suffering an injury special and peculiar to himself. The mere fact that the right of inspection was refused *him* is not such an injury. Otherwise, in every instance where a mandamus could issue on the relation of the attorney general or the district attorney, it could issue on behalf of an individual plaintiff where the respondents refused to the plaintiff the performance of the duty sought to be enforced.¹²⁷⁶

Requiring a petition for mandamus to be brought by a public official may deprive a person of the right of inspection if the official fails either to petition for enforcement or to pursue the petition to its fullest extent. Compelling a citizen to rely on a public official

1273. See Comment, *supra* note 1210, at 1667-69.

1274. See, e.g., *Clément v. Graham*, 78 Vt. 290, 63 A. 146 (1906). The opinion includes an excellent discussion of numerous early cases on point. See also *Butcher v. Civil Serv. Commn.*, 163 Pa. Super. 343, 61 A.2d 367 (1948). Although holding that there was no general right to petition for mandamus, the *Butcher* court seemed to indicate that such a right might exist if "municipal finances" were involved. 163 Pa. Super. at 346, 61 A.2d at 368.

1275. See *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 200 S. 739 (1941); *Nowack v. Auditor Gen.*, 243 Mich. 200, 219 N.W. 749 (1928) (newspapers allowed to petition in their own right since they were deemed to have a special interest in public records); *Colnon v. Orr*, 71 Cal. 43, 45, 11 P. 814, 815 (1886), in which the court held:

While it is the right of a citizen of this state to inspect the public records at such times as the statute provides, nevertheless a writ of mandate to enforce that right cannot always be invoked.

It must be issued upon affidavit, on the application of the party *beneficially interested*, in all cases where there is not a plain, speedy and adequate remedy given by law, and not otherwise. . . .

What beneficial interest in the examination of this document, even conceding that it was a part of the public records, Mr. Colnon can have, simply for the reason that *he is a citizen of California*, we cannot perceive from the record, nor has he sought to allege any such interest in his petition; and therefore he has not brought himself within the purview of the law, which grants to citizens, in certain cases, this special writ.

(Emphasis original.)

1276. *Butcher v. Civil Serv. Commn.*, 163 Pa. Super. 343, 348, 61 A.2d 367, 369 (1948) (emphasis original).

for enforcement seems inconsistent with the underlying theme of freedom of information.

A large number of states with open-records statutes have abrogated any special interest requirement for enforcement. Some of these statutes grant standing to any person (or citizen) "denied" access;¹²⁷⁷ some grant standing to "any person (or citizen) aggrieved."¹²⁷⁸ The same legislative intent probably underlies these two types of provisions, although one could argue that all citizens of a state are "aggrieved" by the failure of a public official to make records available for inspection or publication to anyone who rightfully requests them. Finally, some states apparently do not limit standing and allow any citizen to sue for enforcement of the public right of inspection.¹²⁷⁹

Even if all states eliminated the standing requirement for judicial review, the enforcement process would remain seriously flawed. The expense and delay incurred in seeking judicial review may negate the effectiveness of the review mechanism.¹²⁸⁰ A number of statutory provisions have been adopted by various states in an effort to alleviate these problems.

The provisions that alleviate the cost problem most effectively are found in the Texas¹²⁸¹ and Oregon¹²⁸² acts. Both of these acts require the attorney general to make a determination before judicial review is available.¹²⁸³ The Texas procedure provides that a govern-

1277. *E.g.*, ARK. STAT. ANN. § 12-2806 (1968); COLO. REV. STAT. ANN. § 24-72-204(5) (1973); IND. ANN. STAT. CODE § 5-14-1-6 (Burns 1974) (specifically stating that there need be no showing of special damage); MD. ANN. CODE art. 76A, § 3(e) (Supp. 1974); NEB. REV. STAT. § 84-712.03 (1971); N.J. STAT. ANN. § 47:1A-4 (Supp. 1974); N.Y. PUB. OFFICERS LAW, § 88(8) (McKinney Supp. 1974); PA. STAT. ANN. tit. 65, § 66.4 (1959); VA. CODE ANN. § 2.1-346 (1973); WASH. REV. CODE § 42.17.340(1) (1974); WYO. STAT. ANN. § 9-692.3(f) (Supp. 1973). *See also* Model FOIA, *supra* note 1169, § 6(A).

1278. *E.g.*, CONN. GEN. STAT. ANN. § 1-20 (Supp. 1975); HAWAII REV. STAT. § 92-6 (1968); N.H. REV. STAT. ANN. § 91-A:7 (Supp. 1973). *See also* CAL. GOVT. CODE § 6258 (West Supp. 1975).

1279. *See, e.g.*, LA. REV. STAT. § 44-35 (West 1950); S.C. CODE ANN. § 1-20.4 (Supp. 1973); MASS. ANN. LAWS ch. 39, § 23C (1973) (allowing "any three registered voters" to petition for enforcement).

1280. The obstacles of cost and delay also represent serious problems at the initial stage of the requesting process. Excessive copy or search fees may interfere with public access to information. Similarly, long time-delays before agencies act on information requests can preclude effective public use of public records. Although the states have not generally included provisions in their acts to eliminate such obstacles, the 1974 amendments to the federal FOIA included such provisions. *See* 5 U.S.C.A. §§ 552 (a)(4)(A), (a)(6) (Supp. Feb. 1975). These provisions are discussed in the text at notes 847-99 & 900-38 *supra*.

1281. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7 (Supp. 1974).

1282. ORE. REV. STAT. § 192.440 (1973). The Oregon procedure, however, does not apply to denials that have been made by elected officials. The courts must review such denials directly. ORE. REV. STAT. § 192.480 (1973). *See also* Model FOIA, *supra* note 1169, § 6(A).

1283. However, in Oregon, the appropriate district attorney makes the initial review

ment body seeking to withhold records under a statutory exemption must petition the attorney general for a determination of the applicability of the claimed exemption. This petition must be filed within a reasonable time, but not later than ten days from the date of the request. The Texas statute further specifies that if an agency fails to file a timely petition, "the information shall be presumed to be public."¹²⁸⁴ This procedure places the burden of going forward upon the agency, thereby sparing the requesting party the cost and trouble of an appeal in the courts. The stringent time limit should eliminate some of the delays in the review process. Although the act allows either the requesting party or the attorney general to petition the appropriate court to compel compliance,¹²⁸⁵ this procedure may be weakened by the absence of a provision for judicial review of the attorney general's determination.

The Oregon statute provides that a person denied records by a public official may petition the attorney general for review.¹²⁸⁶ After the attorney general rules upon the validity of the withholding, either the requesting party or the agency may institute proceedings for judicial review of this determination.¹²⁸⁷ The act states that the agency has the burden of sustaining its denial of disclosure.¹²⁸⁸ Because of its more stringent time limits and the heavier burden it places upon the agency seeking to invoke an exemption, the Texas act may be superior to the Oregon act. However, the failure of the Texas act to allow appeals from the attorney general's determinations may be a significant defect in that act.

The tremendous costs necessarily incurred when an agency denial is challenged in the courts makes these attorney general review provisions especially significant. Even when these nonjudicial review procedures must be initiated by the party requesting the records, as

for public bodies other than state agencies. ORE. REV. STAT. § 192.460 (1973). In Texas, the decisions of local government bodies are reviewed by the attorney general. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7 (Supp. 1974).

1284. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7 (Supp. 1974). See Tex. Atty. Gen. Open Records Dec. No. 26, at 2 (March 15, 1974), interpreting this provision as follows: "As a result of the city's failure to comply with the procedure established in § 7(a), we are directed to presume that the information in question is public information. Ordinarily, this presumption will not be overcome unless there is a compelling demonstration that the information requested should not be released to the public, as might be the case, for instance, if it is information deemed confidential by some other source of law." See also Tex. Atty. Gen. Open Records Dec. Nos. 31, (May 7, 1974), 44 (Aug. 16, 1974).

1285. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 8 (Supp. 1974).

1286. ORE. REV. STAT. § 192.450(1) (1974).

1287. ORE. REV. STAT. § 192.450(2) (1974), which provides for review under ORE. REV. STAT. § 192.490 (1974).

1288. ORE. REV. STAT. § 192.450(1) (1974). See also Model FOIA, *supra* note 1169, § 6(B).

is the case under the Oregon act, they can greatly reduce the costs to the parties involved.¹²⁸⁹

Another method of mitigating the cost of challenging agency withholdings is to allow a party to recover some of the costs of litigating an enforcement suit. The Oregon statute specifically provides that a party prevailing on appeal shall be awarded reasonable attorney fees and that a party prevailing in part may be awarded reasonable attorney fees or a part thereof.¹²⁹⁰ The Washington act states that a person prevailing against an agency shall be awarded all costs, including reasonable attorney fees, incurred in connection with the legal action.¹²⁹¹ Finally, Colorado provides that the custodian of the disputed records personally may be ordered to pay the applicant's court costs and attorney fees, upon a finding that the denial was arbitrary and capricious.¹²⁹² An express provision that makes an agency liable for litigation costs is necessary because "[t]he general rule is that in suits where the state is a party in its own courts, it is not liable for costs in the absence of an express statute creating such liability" This general rule is also applicable not only to 'the state' as such, but also to state agencies."¹²⁹³

The significant delays that often accompany the judicial review process may also hinder the effective enforcement of the right of inspection. The information sought may be virtually useless by the time it is obtained; thus, many persons seeking public records may be deterred from challenging an agency denial in court unless the review process is expedited. In recognition of this problem many states have granted cases reviewing information denials a preference

1289. The implementation of such a procedure at the federal level should be considered. The Justice Department has, on its own initiative, taken one step toward implementing a pre-judicial review procedure. The Department currently requires all federal agencies to inform the Department's Freedom of Information Committee of all intended denials of FOIA requests. The Committee screens these denials and recommends disclosure or withholding. If the Committee does not approve the withholding, and the denial is subsequently challenged in court, the Justice Department will refuse to defend the agency. 28 C.F.R. § 50.9(a) (1974). See note 956 & text at note 1003 *supra*. Although this procedure is not adversarial, it could serve as the foundation for the establishment of an attorney general review procedure such as that mandated in Texas.

1290. ORE. REV. STAT. § 192.490(3) (1974). See also Model FOIA, *supra* note 1169, § 6(D).

1291. WASH. REV. CODE § 42.17.340(3) (1974).

1292. COLO. REV. STAT. ANN. § 24-72-204(5) (1973).

1293. *Corneal v. State Plant Bd.*, 101 S.2d 371, 371 (Fla. 1958). See Annot., 72 A.L.R. 2d 1376 (1960) (discussing numerous cases on point). Such a statutory provision is also necessary on the federal level, although in some cases federal courts may award attorney fees even in the absence of such a provision. See text at notes 1016-71 *supra*. The federal act expressly allows the courts to "assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any [FOIA case] in which the complainant has substantially prevailed." 5 U.S.C.A. § 552(a)(4)(E) (Supp. Feb. 1975).

or priority on the trial calendar,¹²⁹⁴ while others have set a definite time limit for a hearing.¹²⁹⁵

e. *Sanctions.* The final element of a comprehensive open-records law is a sanctions provision. Such a provision is intended to deter public officials from wrongfully refusing to comply with information requests. Most access statutes include one or more sanctions. The great majority of them make it a misdemeanor for public officials to violate the provisions of the act.¹²⁹⁶ The specified criminal penalty is usually a small fine, a short jail sentence, or both.¹²⁹⁷ Some statutes require that a violation be "willfully and knowingly" committed in order to be a criminal offense;¹²⁹⁸ others include no specific scienter requirement.¹²⁹⁹ Although the latter standard might encompass even an innocent violation, it seems unlikely that an official acting in good faith would be held criminally liable.

It is difficult to determine whether such sanctions are effective in deterring public officials from wrongfully withholding public records. In order for penal sanctions to be effective, the states must be willing to prosecute violators. Because the states may hesitate to do so, especially where the official has simply made a mistake of

1294. See, e.g., CAL. GOVT. CODE § 6258 (West Supp. 1975); COLO. REV. STAT. ANN. § 24-72-204(5) (1973); LA. REV. STAT. § 44:35 (West 1950); N.H. REV. STAT. ANN. § 91-A:7 (Supp. 1973); ORE. REV. STAT. § 192.490(2) (1974). See also Model FOIA, *supra* note 1169, § 6(C); 5 U.S.C.A. § 552(a)(4)(D) (Supp. Feb. 1975). The federal provision is merely a general directive that priority is to be accorded FOIA cases, and its effect appears to be limited. See text at notes 1007-15 *supra*. The federal act does, however, include an additional provision requiring defendants in FOIA cases to answer the complaint within 30 days after it is served "unless the court otherwise directs for good cause shown." 5 U.S.C.A. § 522(a)(4)(C) (Supp. Feb. 1975), discussed in the text at notes 997-1006 *supra*.

1295. See, e.g., ARK. STAT. ANN. § 12-2806 (1968) (seven days); VA. CODE ANN. § 21-346 (1973) (seven days or given preference).

1296. E.g., ALA. CODE tit. 41, § 146 (1959); ARK. STAT. ANN. § 12-2807 (1968); COLO. REV. STAT. ANN. § 24-72-206 (1973); FLA. STAT. ANN. §§ 119.02, .10 (Supp. 1974); IND. CODE § 5-14-1-6 (1971); IOWA CODE § 68A.6 (1971); KAN. STAT. ANN. § 45-203 (1973); LA. REV. STAT. § 44:37 (West 1950); MD. ANN. CODE art. 76A, § 5 (Supp. 1974); MASS. ANN. LAWS ch. 66, § 15 (1971); MO. REV. STAT. § 109.180 (1969); NEB. REV. STAT. § 84-712.03 (1971); NEV. REV. STAT. § 239.010(2) (1973); N.M. STAT. ANN. § 71-5-3 (1961); N.C. GEN. STAT. § 132-9 (1974); TENN. CODE ANN. § 15-306 (1973); WYO. STAT. ANN. § 9-692.5 (Supp. 1973). See generally *Cassidy v. Cannon*, 18 Cal. App. 426, 123 P. 359 (1912) (on petition for rehearing); [1967] OP. N.M. ATTY. GEN. 80, 82-83. A few states prescribe, as an alternative, that an official who violates the act shall be subject to removal or impeachment. See, e.g., FLA. STAT. ANN. § 119.02 (Supp. 1974); KAN. STAT. ANN. § 45-203 (1973); MO. REV. STAT. § 109.180 (1969); NEB. REV. STAT. § 84-712.03 (1971).

1297. These range from up to \$1000 or up to six months for the first offense, and up to \$2000 and/or up to 6 months for subsequent offenses, LA. REV. STAT. § 44:37 (West 1950), to not more than \$20 for each month of refusal or neglect. MASS. ANN. LAWS ch. 66, § 15 (1971); N.C. GEN. STAT. § 132-9 (1974).

1298. E.g., COLO. REV. STAT. ANN. § 24-72-206 (1973); MD. ANN. CODE art. 76A, § 5 (Supp. 1974); WYO. STAT. ANN. § 9-692.5 (Supp. 1973).

1299. E.g., FLA. STAT. ANN. § 119.02 (Supp. 1974); KAN. STAT. ANN. § 45-203 (1973); N.M. STAT. ANN. § 71-5-3 (1961).

judgment, such penal sanctions may be relatively ineffectual. As an alternative, a few states have provided for the imposition of civil sanctions upon offending officials. The Washington act allows a court to assess up to \$25 per day against the offending official for each day of improper withholding.¹³⁰⁰ The Ohio act provides that the attorney general may collect up to \$100 in a civil action against an offending official.¹³⁰¹ In addition, a few state statutes specifically provide that noncompliance with a court order requiring disclosure will be considered a contempt of court.¹³⁰² Finally, the Washington act includes a unique provision to the effect that a party may not be "adversely affected" by records that have not been made available as required by law.¹³⁰³ This provision parallels the provision under many state open-meeting laws for nullification of official actions taken at meetings improperly closed to the public.¹³⁰⁴ The efficacy of such a provision, however, has not yet been tested in the courts.

It may be that none of these sanctions will be particularly effective. Because most unlawful withholdings are probably not done in bad faith, officials are not likely to respond to punitive sanctions. Although all open records statutes should include a strong sanctions provision as a symbolic manifestation of the importance of bureaucratic compliance with the policy of freedom of information, the actual deterrent effect of such sanctions is probably minimal. The most effective remedy for abuses may simply be the establishment of an expedient and efficient review procedure to correct unlawful withholdings of public records.

E. State and Proposed Federal Open-Meeting Laws

An important result of the campaign to promote "freedom of information" and to ensure open government has been the proliferation of open-meeting laws.¹³⁰⁵ While there is no general

1300. WASH. REV. CODE § 42.17.340(3) (1974).

1301. OHIO REV. CODE ANN. § 149.99 (Page 1969). The most effective alternative would be a provision authorizing either disciplinary action against officials who improperly withhold information, *cf.* 5 U.S.C.A. § 552(a)(4)(F) (discussed in the text at notes 1072-97 *supra*), or removal of such officials from office.

1302. *E.g.*, CAL. GOVT. CODE § 6259 (West Supp. 1975); ORE. REV. STAT. § 192.490(1) (1974). See also Model FOIA, *supra* note 1169, § 6(B).

1303. WASH. REV. CODE § 42.17.250(2) (1974). See also MICH. COMP. LAWS ANN. § 24.223(1) (Supp. 1974). The federal act contains a somewhat analogous provision that states that "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1) (1970). There is a similar provision in 5 U.S.C.A. § 552(a)(2) (Supp. Feb. 1975). These provisions are more limited than the Washington act, in that they refer only to two categories of public records (those defined in 5 U.S.C. §§ 552(a)(1) and (2)). Further, they require only "actual notice," rather than full compliance with the statute in making the information available.

1304. See text at notes 1392-415 *infra*.

1305. These statutes have been given a variety of names, including "right-to-know"

common-law right to attend meetings of government agencies,¹³⁰⁶ all but a few states have enacted relatively comprehensive statutes providing such a right,¹³⁰⁷ and Congress is currently considering proposals for a comprehensive federal open-meeting act.¹³⁰⁸

laws and "sunshine" laws. Some open-meeting laws are incorporated along with state open-records laws in comprehensive "freedom of information" acts. *See, e.g.*, ARK. STAT. ANN. § 12-2801 to -2807 (1968); VA. CODE ANN. §§ 2.1-340 to -346 (1973), *as amended*, (Supp. 1974). *See generally* Annot., 38 A.L.R. 3d 1071 (1971).

1306. *See* Beacon Journal Publishing Co. v. City of Akron, 3 Ohio St. 2d 191, 198, 209 N.E.2d 399, 404 (1965); City of Miami Beach v. Berns, 245 S.2d 38, 40 (Fla. 1971); Reeves v. Orleans Parish School Bd., 281 S.2d 719, 723 (La. 1973) (Summers, J., concurring); H. CROSS, *supra* note 1168, at 180-82; Comment, *Open Meetings in Virginia: Fortifying the Virginia Freedom of Information Act*, 8 U. RICH. L. REV. 261, 262 (1974).

It has been suggested that there may be a first amendment right to attend such meetings, but the courts have not accepted this argument. *See* Note, *Open Meeting Statutes: The Press Fights for the "Right To Know"*, 75 HARV. L. REV. 1199, 1204 (1962); Comment, *Ambiguities in Oregon's Open Meeting Legislation*, 53 ORE. L. REV. 339, 341-42 (1974). *Cf.* Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 654-55, 117 Cal. Rptr. 106, 111-12 (1974), *citing* Griswold v. Connecticut, 381 U.S. 479 (1965).

1307. *See* ALA. CODE tit. 14, §§ 393-94 (1958); ALAS. STAT. §§ 44.62.310-.312 (1967), *as amended*, (Supp. 1974); ARIZ. REV. STAT. ANN. §§ 38-431 to -431.08 (1974); ARK. STAT. ANN. §§ 12-2801 to -2807 (1968); CAL. GOVT. CODE §§ 11120-31 (West Supp. 1975), §§ 54950-60 (West 1966), *as amended*, (West Supp. 1975), 54961 (West Supp. 1975); COLO. REV. STAT. ANN. §§ 24-6-401 to -402 (1973), 29-9-101 (1973), *as amended*, 1974 Session Laws ch. 102, § 1; CONN. GEN. STAT. ANN. § 1-21 (1969), *as amended*, (Supp. 1975); DEL. CODE ANN. tit. 29, § 5109 (1974); FLA. STAT. ANN. § 286.011 (Supp. 1974); GA. CODE ANN. §§ 40-3301 to -3303 (Supp. 1974); HAWAII REV. STAT. §§ 92-1 to -6 (1968); IDAHO CODE §§ 67-2340 to -2346 (Supp. 1974); ILL. REV. STAT. ch. 102, §§ 41-46 (1973); IND. CODE §§ 5-14-1-1 to -6 (1971); IOWA CODE §§ 28A.1-8 (1971); KAN. STAT. ANN. §§ 75-4317 to -4320 (Supp. 1974); KY. REV. STAT. ANN. §§ 61.805-.991 (Supp. 1974); LA. REV. STAT. ANN. §§ 42:5 to :8 (West 1965), *as amended*, (Supp. 1975), § 42:9 (Supp. 1975); ME. REV. STAT. ANN. tit. 1, §§ 401-06 (1964), *as amended*, (Supp. 1974); MD. ANN. CODE art. 41, § 14 (1971), art. 23, § 8 (Supp. 1974), art. 25, § 5 (1973); MASS. ANN. LAWS ch. 30A, § 11A (1973); MICH. COMP. LAWS §§ 15.251-.253 (1970); MINN. STAT. ANN. § 471.705 (Supp. 1974); MO. REV. STAT. §§ 610.010-.030 (Cum. Supp. 1973); MONT. REV. CODES ANN. §§ 82-3401 to -3403 (1966); NEB. REV. STAT. §§ 84-1401 to -1407 (Cum. Supp. 1974); NEV. REV. STAT. §§ 241.010-.040 (1973); N.H. REV. STAT. ANN. §§ 91-A:1 to :8 (Supp. 1973); N.J. STAT. ANN. §§ 10:4-1 to -5 (Supp. 1974); N.M. STAT. ANN. 5-6-23 to -26 (Supp. 1974); N.C. GEN. STAT. §§ 143-318.1 to .7 (1974), *as amended*, (Supp. 1974); N.D. CENT. CODE § 44-04-19 (1960); OHIO REV. CODE ANN. § 121.22 (Page 1969); OKLA. STAT. ANN. tit. 25, §§ 201-02 (Supp. 1974); ORE. REV. STAT. §§ 192.610-.690 (1974); PA. STAT. ANN. tit. 65, §§ 261-69 (1974 Purdon's Pa. Legis. Serv. 480); S.C. CODE ANN. §§ 1-20 to -20.4 (Supp. 1974); S.D. COMP. LAWS ANN. §§ 1-25-1 to -5 (1974); TENN. CODE ANN. §§ 8-4401 to -4406 (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 6252-17 (Supp. 1974); UTAH CODE ANN. §§ 52-4-1 to -4 (1970); VT. STAT. ANN. tit. 1, §§ 311-14 (1972), *as amended*, (Supp. 1974); VA. CODE ANN. §§ 2.1-340 to -346 (1973), *as amended*, (Supp. 1974); WASH. REV. CODE §§ 42.30.010-.920 (1974); WIS. STAT. ANN. § 66.77 (1974 West's Wis. Legis. Serv. 332); WYO. STAT. ANN. §§ 9-692.10 to .16 (Supp. 1973).

A few states have recently adopted constitutional provisions that may guarantee a public right of access to meetings of government bodies. *See, e.g.*, LA. CONST. art. XII, § 3 ("No person shall be denied the right to observe the deliberations of public bodies . . . except in cases established by law"); MONT. CONST. art. II, § 9 ("No person shall be deprived of the right . . . to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases where the demand of individual privacy clearly exceeds the merits of public disclosure"). There has been

Underlying such legislation is the belief that it is "essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy."¹³⁰⁹ It is hoped that open-meeting laws will increase citizen participation in government, thereby improving the political decision-making process:

Every meeting of any board, commission, agency or authority of a municipality should be a marketplace of ideas, so that the governmental agency may have sufficient input from the citizens who are going to be affected by the subsequent action of the municipality. The ordinary taxpayer can no longer be led blindly down the path of government . . . Government, more so now than ever before, should be responsive to the wishes of the public. These wishes could

a tremendous amount of legislative activity on the issue of open meetings in recent years. See Note, *The People's Right To Know in Georgia*, 10 GA. ST. B.J. 598, 599 (1974). See generally L. GILSON, MONEY AND SECRECY (1972); J. Adams, State Open Meetings Laws: An Overview (July 1974) (published by the Freedom of Information Foundation); Stein, *The Secrets of Local Government*, in NONE OF YOUR BUSINESS (N. Dorsen & S. Gillus eds. 1974).

For a discussion of attempts to enact an open-meeting law in Mississippi, which currently has no such law, see Comment, *Open Meetings Laws: An Analysis and a Proposal*, 45 Miss. L.J. 1151 (1974). The other states that do not have such laws are New York, Rhode Island, and West Virginia.

1308. See S. 5, 94th Cong., 1st Sess. (1975); text at notes 1444-98 *infra*.

1309. Common Cause, An Act Requiring Open Meetings of Public Bodies § 1 [hereinafter Common Cause Proposed Act], in *Government in the Sunshine Act, Hearings on S. 260 Before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Governmental Operations*, 93d Cong., 2d Sess. 307, at 307 (1974) [hereinafter *Open-Meeting Hearings*]. See Comment, *The Iowa Open Meetings Act: A Right Without a Remedy?*, 58 IOWA L. REV. 210 (1972); Comment, *supra* note 1210, at 1655. See also *Reeves v. Orleans Parish School Bd.*, 281 S.2d 719, 723 (La. 1973) (Summers, J., concurring).

In an early case interpreting the Florida sunshine law, the Florida supreme court demonstrated that the courts recognized the importance of this policy. Thus, the court said:

The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. . . . One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.

Board of Pub. Instruction v. Doran, 224 S.2d 693, 699 (Fla. 1969).

A number of cases imply that the right of access may include a right to participate in public proceedings. See, e.g., *Town of Palm Beach v. Gradison*, 296 S.2d 473, 475 (Fla. 1974). But see *Barnes v. City of New Haven*, 140 Conn. 8, 20, 98 A.2d 523, 530 (1953). Such public participation would further many of the policies underlying open-meeting acts. See generally Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972). Generally, however, open-meeting laws ensure only the right to observe public proceedings.

never be known in nonpublic meetings, and the governmental agencies would be deprived of the benefit of suggestions and ideas which may be advanced by the knowledgeable public.

Also, such open meetings instill confidence in government. The taxpayer deserves an opportunity to express his views and have them considered in the decision-making process.¹³¹⁰

Although the benefits of open meetings are generally recognized, it has been argued that it may be undesirable to require that they be held.¹³¹¹ Some have suggested that opening the preliminary stages of the decision-making process to public scrutiny will impair the entire process because the free exchange of ideas among public officials may be curtailed.¹³¹² Similarly, the achievement of necessary compromise may be frustrated if officials, having expressed what were intended as preliminary positions, are thereafter inhibited from modifying them.¹³¹³ As one commentator has suggested, the "value competing against a 'right to know' . . . is not a 'right to secrecy,' but an assurance of some insulation from the intense heat of public pressure."¹³¹⁴ Finally, it can be argued that discussion of certain matters in public meetings may so adversely affect other recognized interests (for example, personal privacy) that the public interest in access should yield.¹³¹⁵

The implementation of the open-meeting principle at the state level has produced considerable variation in approach. This section of the Project will examine and compare the experience of a number of states under differing statutory schemes and conclude with an assessment of the proposed federal act.

1. State Open-Meeting Laws

A comprehensive open-meeting law should include: (1) a description of both the government bodies that are subject to the act's provisions and the "meetings" of such bodies or their members that must be open; (2) a list of the specific subjects that may be discussed

1310. *Town of Palm Beach v. Gradison*, 296 S.2d 473, 475 (Fla. 1974).

1311. See *Open-Meeting Hearings*, *supra* note 1309, at 205-06; Note, *supra* note 1306, at 1202-03.

1312. See *Dayton Newspapers, Inc. v. City of Dayton*, 28 Ohio App. 2d 95, 98, 274 N.E.2d 766, 768 (Ct. App. 1971) ("Freedom of discussion and the exchange of ideas is essential to an understanding of a problem. It cannot be satisfactorily accomplished under a spotlight or before a microphone."); *Open-Meeting Hearings*, *supra* note 1309, at 205-06; Note, *supra* note 1306, at 1202-03. Cf. *United States v. Nixon*, 418 U.S. 683, 705 (1974); Perritt & Wilkinson, *Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years*, 63 GEO. L.J. 725, 740 (1975).

1313. Note, *supra* note 1306, at 1202-03. There is also a danger that those involved in open discussions will be pressured either to reject reasonable positions offered by other participants or to decline to advance unpopular recommendations.

1314. Wickham, *Let the Sunshine In!*, 68 NW. U. L. REV. 480, 481 (1973).

1315. See text at notes 1362-82 *infra*.

in closed (executive) session; (3) procedures for citizen enforcement; (4) steps to be taken after a meeting has been held in violation of the act; and (5) sanctions to be applied to individuals who participate in meetings that fail to conform to the act's requirements.¹³¹⁶

a. *General coverage provisions.* State open-meeting laws contain various definitions of the government bodies that are subject to their requirements. Many of these laws simply provide that they apply to all boards, agencies, commissions, and similar governmental groups.¹³¹⁷ A number of other statutes use a "public funds" test, whereby any government body "supported in whole or in part by or expending public funds" is required to hold open meetings.¹³¹⁸ The remaining statutes contain coverage provisions that are generally phrased in terms of the method by which the government bodies were created and/or the purposes that such bodies were intended to serve.¹³¹⁹

1316. In addition, comprehensive acts should also require that adequate public notice be given before all meetings, open or closed, and that transcripts of such meetings be prepared, maintained, and to the extent mandated by the state's open-records act, open to public scrutiny. Provisions requiring notice have been widely enacted. *See, e.g.,* CAL. GOVT. CODE § 11125 (West Supp. 1974); ILL. REV. STAT. ch. 102, § 42.02 (1973); IOWA CODE § 28A.4 (1971); MASS. ANN. LAWS ch. 30A, § 11A (1973); MICH. COMP. LAWS § 15.253 (1970); NEB. REV. STAT. § 84-1402 (Cum. Supp. 1974); N.H. REV. STAT. ANN. § 91-A:2 (Supp. 1973); ORE. REV. STAT. § 192.640 (1974); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 3A (Supp. 1974); WASH. REV. CODE §§ 42.30.070, .080 (1974). *See also* Common Cause Proposed Act, *supra* note 1309, § 6. Provisions requiring the preparation of transcripts include GA. CODE ANN. § 40-3301(b) (Supp. 1974); IOWA CODE § 28A.5 (1971); VA. CODE ANN. § 2.1-343 (Supp. 1974).

1317. *See, e.g.,* COLO. REV. STAT. ANN. § 24-6-402(1) (1973); CONN. GEN. STAT. ANN. § 1-21 (1969), *as amended*, (Supp. 1975); DEL. CODE ANN. tit. 29, § 5109 (1974); FLA. STAT. ANN. § 286.011(1) (Supp. 1974); GA. CODE ANN. § 40-3301 (Supp. 1974); IND. CODE § 5-14-1-2 (1971); ME. REV. STAT. ANN. tit. 1, § 402 (1964); NEV. REV. STAT. § 241.020 (1973); N.H. REV. STAT. ANN. § 91-A:1(III) (Supp. 1973); N.M. STAT. ANN. § 5-6-23(B) (Supp. 1974); OHIO REV. CODE ANN. § 121.22 (Page 1969); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(a) (Supp. 1974); UTAH CODE ANN. § 52-4-2 (1970); VT. STAT. ANN. tit. 1, § 312(a) (Supp. 1974); WIS. STAT. ANN. §§ 66.77(2)(c), (3) (1974 West's Wis. Leg. Serv. 332).

1318. *See, e.g.,* ALAS. STAT. § 44.62.310(a) (1967), *as amended*, (Supp. 1974); ARIZ. REV. STAT. ANN. § 38-431(1) (1974); ARK. STAT. ANN. § 12-2803 (1968); KAN. STAT. ANN. § 75-4318 (Supp. 1974); LA. REV. STAT. ANN. § 42:5 (West 1965); MONT. REV. CODES ANN. § 82-3402 (1966); N.D. CENT. CODE § 44-04-19 (1960); S.C. CODE ANN. § 1-20.1 (Supp. 1974); VA. CODE ANN. § 2.1-341(a) (1973).

1319. *See, e.g.,* ALA. CODE tit. 14, § 393 (1958); CAL. GOVT. CODE § 11121 (West Supp. 1974); HAWAII REV. STAT. § 92-1(1) (1968); ILL. REV. STAT. ch. 102, § 42 (1973); MASS. ANN. LAWS ch. 30A, § 11A (1973); MICH. COMP. LAWS § 15.251 (1970); MINN. STAT. ANN. § 471.705 (Supp. 1974); MO. REV. STAT. § 610.010(2) (Cum. Supp. 1973); NEB. REV. STAT. § 84-1401 (Supp. 1974); N.J. STAT. ANN. § 10:4-2 (Supp. 1974); N.C. GEN. STAT. § 143-318.2 (1974); ORE. REV. STAT. § 192.610 (1974); PA. STAT. ANN. tit. 65, § 261 (1974 Purdon's Pa. Legis. Serv. 480); S.D. COMP. LAWS ANN. § 1-25-1 (1974); TENN. CODE ANN. § 8-4402 (Supp. 1974); WASH. REV. CODE §§ 42.30.020(1), (2) (1974); WYO. STAT. ANN. § 9-692.11(a)(2) (Supp. 1973). It should be noted that some states have limited the coverage of their acts to multi-member agencies, similar to the coverage of the proposed federal act. *See, e.g.,* CAL. GOVT. CODE § 11121 (West Supp. 1975); MO. REV. STAT. § 610.010(2) (Supp. 1975); N.J. STAT. ANN. § 10:4-2 (Supp. 1974); ORE. REV. STAT. § 192.610(3) (1974); TENN. CODE ANN. § 8-4402 (Supp. 1974).

Although the ultimate scope of an open-meeting law may depend upon the type of definitional provision it contains,¹³²⁰ it would be inconsistent with the basic policy behind open-meeting legislation to apply such a provision restrictively. Legislatures have often expressed their desire that open-meeting acts be liberally construed,¹³²¹ and although the question whether particular bodies are within the scope of a particular open-meeting act is not often litigated,¹³²² courts have shown a general willingness to construe such statutes to effectuate the intent of the legislature that the performance of public business be open to public scrutiny.¹³²³

The more important and difficult problem in interpreting the scope of an open-meeting act is to determine which gatherings of members of included government bodies must be open to the

Common Cause has taken an eclectic approach to the definitional problem in its proposed act:

"Public body" means any administrative, advisory, executive, or legislative body of the state or local political subdivision of the state, or any other entity created by law, that expends or disburses or is supported in whole or in part by tax revenue or that advises or makes recommendations to any entity that expends or disburses or is supported in whole or in part by tax revenue, including but not limited to any board, commission, committee, subcommittee, or other subsidiary thereof. Common Cause Proposed Act, *supra* note 1309, § 2(b).

1320. Note, *supra* note 1306, at 1205. Thus, the application of a "public funds" test could result in the exclusion of certain advisory groups. For example, in *Town of Palm Beach v. Gradison*, 296 S.2d 473 (Fla. 1974), the court held that advisory groups were within the scope of the Florida sunshine law. If that law had contained a "public funds" test, the advisory groups would probably not have been required to conduct open meetings.

1321. See, e.g., IND. CODE § 5-14-1-1 (1971); MONT. REV. CODES ANN. § 82-3401 (1966); WASH. REV. CODE § 42.30.910 (1974). See also Common Cause Proposed Act, *supra* note 1309, § 1; 36 OP. ORE. ATTY. GEN. 543, 544 (1973). Cf. ARK. STAT. ANN. § 12-2802 (1968); CAL. GOVT. CODE §§ 11120 (West Supp. 1975), 54950 (West 1966); ILL. REV. STAT. ch. 102, § 41 (1973); ME. REV. STAT. ANN. tit. 1, § 401 (1964); NEV. REV. STAT. § 241.010 (1973); N.J. STAT. ANN. § 10:4-1 (Supp. 1974); N.C. GEN. STAT. § 143-318.1 (1974); UTAH CODE ANN. § 52-4-1 (1970); WIS. STAT. ANN. § 66.77(1) (1974 West's Wis. Legis. Serv. 332).

1322. Most questions of coverage deal with problems of advisory bodies or subgroups of agencies. See, e.g., *McLarty v. Board of Regents*, 231 Ga. 22, 200 S.E.2d 117 (1973). See text at notes 1348-61 *infra*. Those courts that have considered whether specific government bodies are within the purview of an open-meeting act generally have dismissed the contention that a particular body is not included with little discussion. See, e.g., *Selkove v. Bean*, 109 N.H. 247, 248, 249 A.2d 35, 36 (1968).

1323. For example, in *Raton Pub. Serv. Co. v. Hobbes*, 76 N.M. 535, 417 P.2d 32 (1966), the court held that a city-owned electric utility company must meet the requirements of the state's open-meeting act, stating:

To conclude that the legislature was thinking specifically of bodies such as appellant when it used the language it did would accord to them more reason and foresight than could be supported by the facts. However, the language used, being broad enough to include appellant, we perceive it as our duty to uphold the act and its application to appellant. The legislature, in its wisdom, having passed § 5-6-17, N.M.S.A. 1953, and appellant being within its broad terms, we are impressed that there is no reason to attempt to excuse it from the operation of the act.

76 N.M. at 543, 417 P.2d at 37. Cf. *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968).

public. There is a wide spectrum of gatherings that can be considered "meetings," ranging from formal convocations of an entire agency membership to informal conversations between two agency members.¹³²⁴ Since open-meeting acts are aimed at permitting the public to know about and contribute to deliberations that lead to government action, a requirement that meetings be open only when final action is to be taken would be inadequate.¹³²⁵ Nevertheless, while mere administrative inconvenience is not sufficient to outweigh the public interest in open government,¹³²⁶ a requirement that *all* gatherings at which public business may be discussed be open (and preceded by notice) would unnecessarily interfere with the lives of public officials and impair governmental efficiency.¹³²⁷

Florida's experience under a statute that speaks only of "meetings . . . at which official acts are to be taken"¹³²⁸ demonstrates the problems that arise when an open-meeting law does not specifically delimit its scope.¹³²⁹ In Florida, the courts and the attorney general have had to make essentially legislative judgments about which gatherings constitute "meetings."

The Florida courts have recognized that the policy underlying the Florida sunshine law requires that the whole decision-making process be as open as possible;¹³³⁰ thus, they have construed expansively the phrase "meetings at which official acts are taken." One Florida court has stated:

1324. See *Reeves v. Orleans Parish School Bd.*, 281 S.2d 719, 721 (La. 1973) ("The key to the problem is the meaning of the word 'meetings' as used in the quoted statutes. A meeting may be simply a coming together or a gathering for business, social or other purposes"); Comment, *supra* note 1210, at 1655.

1325. As was stated in the early case of *Acord v. Booth*, 33 Utah 279, 284, 93 P. 734, 735-36 (1908): "The purpose [of allowing public access] was not that the public might know how the vote stood, but the purpose evidently was that the public might know what the councilmen thought about the matters Moreover, the public have the right to know just what public business is being considered, and by whom and to what extent"

1326. See *Sullivan v. Credit River Township*, — Minn. —, —, 217 N.W.2d 502, 506-07 (1974).

1327. See *Reeves v. Orleans Parish School Bd.*, 281 S.2d 719, 721 (La. 1973), in which the court refused to proscribe preliminary discussions between members of the board on matters "which do not require official board action" because it was "satisfied [that] the statutes intend[ed] no such crippling limitation." The court did, however, prohibit informal conference sessions by the board. See also Comment, *supra* note 1210, at 1651.

1328. FLA. STAT. ANN. § 286.011(1) (Supp. 1974).

1329. See generally Kalil, *Florida Sunshine Law: Is Florida Sunshine the Most Powerful of Disinfectants?*, 49 FLA. B.J. 72 (1975).

1330. See *Times Publishing Co. v. Williams*, 222 S.2d 470, 473 (Fla. Dist. Ct. App. 1969). Other states have similarly interpreted their sunshine laws. See, e.g., Letter from Israel Packel, Pennsylvania Attorney General, to Governor Milton Shapp, September 12, 1974, at 1 [hereinafter Packel Letter]; *Local 92, Am. Newspaper Guild v. Board of Supervisors*, 263 Cal. App. 2d 41, 47, 69 Cal. Rptr. 480, 485 (1968) ("Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either").

Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire *decision-making process* that the legislature intended to affect by the enactment of the statute before us Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action. It follows that each step constitutes an "official act," an indispensable requisite to "formal action," within the meaning of the act.¹³³¹

Additionally, the Florida supreme court, holding that a city council could not conduct closed meetings even for the purposes of discussion, has said: "It is the law's intent that any meeting relating to any matter on which foreseeable action will be taken, occur openly and publicly. In this area of regulating, the statute may push beyond debatable limits in order to block evasive techniques. An informal conference or caucus of any two or more members permits crystallization of secret decisions to a point just short of ceremonial acceptance."¹³³²

In 1971, the Florida Attorney General considered whether telephone conversations between two members of a board or commission were subject to the sunshine law.¹³³³ Relying on the liberal construction given the law by the courts, he concluded that such "conversations between public officials on aspects of the public's business are part of the process which ultimately leads up to a final recorded action in a formal public meeting" and that the public may not be deliberately excluded from these "meetings."¹³³⁴ He refused, however, to require that public officials provide advance notice before engaging in such discussions.¹³³⁵ Applying what he labeled the "rule of reason," he stated that "[t]o force public officials to give a period of notice to the press and public before making individual telephone calls or engaging in informal conversation with other members of the board or commission would slow the free and healthy conduct of the public's business to a standstill and thwart the interchange of ideas among public officials."¹³³⁶ His opinion effectively excludes these discussions from public scrutiny.

The next year, in *Bassett v. Braddock*,¹³³⁷ the Florida supreme court held that preliminary labor negotiations may be conducted in private. The court observed:

Every action emanates from thoughts and creations of the mind and

1331. *Times Publishing Co. v. Williams*, 222 S.2d 470, 473 (Dist. Ct. App. 1969).

1332. *City of Miami Beach v. Berns*, 245 S.2d 38, 41 (1970).

1333. Op. Fla. Atty. Gen. No. 071-32 (March 3, 1971).

1334. *Id.* at 7.

1335. *Id.* at 8.

1336. *Id.*

1337. 262 S.2d 425 (1972).

exchanges with others. These are perhaps "deliberations" in a sense but hardly demanded to be brought forward in the spoken word at a public meeting. To carry such matters to an extreme approaches the ridiculous; it would defeat any meaningful and productive process of government. One must maintain perspective on a broad provision such as this legislative enactment, in its application to the actual workings of an active Board fraught with many and varied problems and demands.¹³³⁸

Thus, in the absence of clear legislative guidelines, both the courts and the Attorney General in Florida have had to recognize, on a case-by-case basis, that there are practical considerations that dictate limitations upon the fundamental policy of openness.

The states have variously defined the stage in the decision-making process at which their open-meeting requirements become operative. Many states simply include "all meetings."¹³³⁹ A number of other states use language similar to that of the Florida act—"all meetings at which official acts are to be taken."¹³⁴⁰ Still other states have statutes that cover all meetings, "formal or informal" and/or "special or regular."¹³⁴¹ The danger inherent in such vague definitions is that some courts may be reluctant to construe them as broadly as have the Florida courts. Where open-meeting statutes are restrictively interpreted to cover only meetings at which final approval is given to public measures,¹³⁴² their fundamental policy

1338. 262 S.2d at 428.

1339. See, e.g., ALAS. STAT. § 44.62.310(a) (1967), as amended, (Supp. 1974); HAWAII REV. STAT. § 92-2 (1968); ILL. REV. STAT. ch. 102, § 42 (1973); LA. REV. STAT. ANN. § 42:5 (West 1965); MASS. ANN. LAWS ch. 30A, § 11A (1973); MINN. STAT. ANN. § 471.705(1) (Supp. 1974); NEV. REV. STAT. § 241.020 (1973); N.D. CENT. CODE § 44-04-19 (1960); OHIO REV. CODE ANN. § 121.22 (Page 1969); OKLA. STAT. ANN. tit. 25, § 201 (Supp. 1974); UTAH CODE ANN. § 52-4-2 (1970); VT. STAT. ANN. tit. 1, § 312(a) (Supp. 1974).

1340. FLA. STAT. ANN. § 286.011(1) (Supp. 1974). Similar provisions include GA. CODE ANN. § 40-3301(a) (Supp. 1974); MICH. COMP. LAWS § 15.251(2) (1970) (defining "public meeting" as that part of a meeting during which the body votes); MONT. REV. CODES ANN. § 82-3402 (1966); N.J. STAT. ANN. § 10:4-2 to -3 (Supp. 1974) (meetings at which a vote is taken); PA. STAT. ANN. tit. 65, §§ 261-62 (1974 Purdon's Legis. Serv. 480) (meetings at which there is voting or setting of official policy); WYO. STAT. ANN. § 692.11(a)(1) (Supp. 1973) (meetings at which collective commitments or promises to make a positive or negative decision are made). The Washington statute states that official "action" includes but is not limited to collective decisions, commitments, and votes. WASH. REV. CODE § 42.30.020(3) (1974). Cf. DEL. CODE ANN. tit. 29, § 5109 (1974); IND. CODE § 5-14-1-2(2) (1971); N.H. REV. STAT. ANN. § 91-A:1 (Supp. 1973); N.C. GEN. STAT. § 143-318.2 (1974).

1341. See ARK. STAT. ANN. § 12-2805 (1968); MO. REV. STAT. § 610.010(3) (Cum. Supp. 1973); S.C. CODE ANN. § 1-20.3(a) (Supp. 1975). See also IOWA CODE § 28A.1 (1971); MD. ANN. CODE art. 41, § 14 (1971); VA. CODE ANN. § 2.1-341(a) (1973).

1342. See *Turk v. Richard*, 47 S.2d 543 (Fla. 1950) (interpreting the old Florida open-meeting law). See also *Adler v. City Council*, 184 Cal. App. 2d 763, 770-71, 7 Cal. Rptr. 805, 810 (1960). But see *Local 92, Am. Newspaper Guild v. Board of Supervisors*, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480, 487 (1968), in which, in interpreting the "all meetings" language of the California local government open-meeting act, the court held: "As operative criteria, formality and informality are alien to the law's design, expos-

of allowing the public to participate during all stages of the decision-making process can easily be subverted.¹³⁴³

States that have decided not to restrict the scope of their statutes to meetings at which final action is taken have had to consider how best to resolve the conflict between the principle of open government and the need to ensure the efficient functioning of government. Some states, choosing to further the ideal of citizen participation, require that any gathering to discuss or formulate public policy be open to the public.¹³⁴⁴ Other states, more concerned with the problems of efficiency, require only that "official" or "convened" meetings be open,¹³⁴⁵ or specifically exclude social or chance gatherings.¹³⁴⁶ Finally, a number of states have "compromised" by restricting the applicability of their open-meeting laws to meetings at which a quorum is present¹³⁴⁷ on the theory that, since no binding

ing it to the very evasions which it was designed to prevent. Construed in light of the [statute's] objectives, the term "meeting" extends to informal sessions or conferences of the board members designed for the discussion of public business."

1343. See *Grogan v. De Sapio*, 15 N.J. Super. 604, 83 A.2d 809 (L. Div. 1951); *Cullum v. Board of Educ.*, 15 N.J. 285, 104 A.2d 641 (1954); *Detroit Free Press*, Aug. 30, 1974, § C, at 6, col. 3 (metro ed.) (suggesting that "[t]he most common method of evading the [Michigan open-meeting law] is for public bodies . . . to go into private executive sessions to make their decisions and then cast perfunctory votes in public"). See also Comment, *supra* note 1210, at 1651; 49 TEXAS L. REV. 764, 769-70 (1971).

1344. See, e.g., COLO. REV. STAT. ANN. § 24-6-402(2) (1973); KY. REV. STAT. § 61.805 (1) (Supp. 1974); N.M. STAT. ANN. § 5-6-23(C) (Supp. 1974); ORE. REV. STAT. § 192.610 (1974); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 1 (Supp. 1974). See also Common Cause Proposed Act, *supra* note 1309, § 2(a).

1345. See, e.g., ARIZ. REV. STAT. § 38-431.01(A) (1974); IND. CODE § 5-14-1-2 (1971); NEB. REV. STAT. § 84-1401 (Cum. Supp. 1974); S.D. COMP. LAWS ANN. § 1-25-1 (1974); TENN. CODE ANN. § 8-4402 (Supp. 1974). Limitations such as these may result in the elimination of uncertainty if they are interpreted to exclude all but the final steps of the decision-making process from the open-meeting requirements. Cf. Comment, 53 ORE. L. REV. 349, *supra* note 1306, at 349. However, the result would thus be identical to that achieved in states where the term "meeting" itself is read restrictively to include only meetings at which final action is taken. See text at notes 60-61 *supra*. Cf. text at notes 1348-50 *infra*. But see WIS. STAT. ANN. § 66.77(2)(b) (1974 West's Wis. Legis. Serv. 332), which defines "meeting" as "the convening of a governmental body in a session such that the body is vested with authority, power, duties, or responsibilities not vested in the individual members." While the term "convening" might be a limitation, the remainder of the definition implies that it will be given considerable scope.

1346. See, e.g., N.C. GEN. STAT. § 143-318.2 (1974); TENN. CODE ANN. § 8-4402 (Supp. 1974); VA. CODE ANN. § 2.1-341(a) (1973); WIS. STAT. ANN. § 66.77(2)(b) (1974 West's Wis. Legis. Serv. 332).

1347. See, e.g., ARIZ. REV. STAT. § 38-431(2) (1974); CAL. GOVT. CODE § 54952.3 (West Supp. 1975); KY. REV. STAT. § 61.805.3 (Supp. 1975); N.M. STAT. ANN. §§ 5-6-23(B), (C) (Supp. 1974); N.C. GEN. STAT. § 143-318.2 (1974); ORE. REV. STAT. § 192.630 (1974); TENN. CODE ANN. § 8-4402 (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 1 (Supp. 1974). See also Common Cause Proposed Act, *supra* note 1309, § 2(a). At least one state supreme court, see *Reeves v. Orleans Parish School Bd.*, 281 S.2d 719, 721-22 (La. 1973) (dictum), and one state attorney general, see Packel Letter, *supra* note 1330, at 5, have interpreted "all meetings" to mean that a quorum must be present. Even in Florida, where the courts have accepted no definite limitations on the scope of the

decisions can be reached absent a quorum, the public will still have an opportunity to observe the agency's final action.¹³⁴⁸ Unfortunately, this last group of states may be seriously undermining the policy of open government: Meaningful citizen input into the decision-making process requires that public observation be allowed during the early stages of deliberation,¹³⁴⁹ especially in situations where the recommendations of a less-than-quorum-sized group¹³⁵⁰ may be approved by the agency membership with only perfunctory consideration.

State experience in dealing with the question whether—and, if so, how—advisory committees should be treated under an open-meeting act illustrates some of the most significant issues involved in defining the scope of a coverage provision.¹³⁵¹ The Georgia supreme court, holding that a university student-activity fund committee was not covered by the Georgia sunshine law, stressed the group's inability to take binding action:

What the law seeks to eliminate are closed meetings which engender in the people a distrust of its officials who are clothed with the power to act in their name. It declares that the people, who possess ultimate sovereignty under our form of government, are entitled to observe the actions of those described bodies when exercising the power delegated to them to act on behalf of the people in the name of

sunshine law, the attorney general has apparently recognized the certainty that such a "quorum limit" would afford. Op. Fla. Atty. Gen. No. 071-32, at 10 (March 3, 1971).

1348. 32 OP. CAL. ATTY. GEN. 240, 242 (1958).

1349. See Note, *supra* note 1306, at 1205-06.

1350. For the purposes of this discussion a "less-than-quorum-sized group" should be distinguished from a formally constituted agency subunit that would itself be considered a separate government entity. A number of state open-meeting statutes apply by their terms to the meetings of "subsidiary bodies," "subordinate units," or committees and subcommittees. *E.g.*, ALAS. STAT. § 44.62.310(a) (Supp. 1974); ILL. REV. STAT. ch. 102, § 42 (1973); KAN. STAT. ANN. § 75-4318 (Supp. 1974); MINN. STAT. ANN. § 471.705 (1) (Supp. 1974); NEB. REV. STAT. § 84-1401 (Cum. Supp. 1974). Since several statutes that have similar provisions also have "quorum-limit" rules, *e.g.*, KY. REV. STAT. §§ 61.805(2), .810 (Supp. 1974); N.C. GEN. STAT. §§ 143-318.2, .3 (1974); ORE. REV. STAT. §§ 192.610(2), .630(2) (1974), such provisions refer only to formally constituted subunits. The Wisconsin Act specifically so limits its provision for subgroups. WIS. STAT. ANN. § 66.77(2)(c) (1974 West's Wis. Legis. Serv. 332).

1351. "Advisory groups" may serve many different functions and may assume various forms. Thus, the Georgia supreme court, in *McLarty v. Board of Regents*, 231 Ga. 22, 22-23, 200 S.E.2d 117, 119 (1973), described them as "the innumerable groups which are organized and meet for the purpose of collecting information, making recommendations, and rendering advice but which have no authority to make governmental decisions and act for the State." Recognizing the potential inclusiveness of the term, the Oregon attorney general stated:

The law also applies to any formal or informal advisory group or body appointed by a state or local governmental agency or official which also operates as a deliberative body. The test of whether an advisory group is covered by the laws is whether the group is deliberative in the sense that votes are taken and there is normally a quorum requirement. Consequently the law does not apply to internal agency staff meetings

36 OP. ORE. ATTY. GEN. 543, 545 (1973).

the State. There is no such compelling reason to require public meetings of advisory groups. They can take no official action.¹³⁵²

This emphasis on the type of action taken, however, ignores the fundamental objective of opening the preliminary steps in the government's decision-making process to public scrutiny.¹³⁵³ Although the student and faculty members of this committee were not "public officials," their recommendations arguably constituted the most significant stage of the budgetary process. Moreover, the premise that closing the committee's meetings would not engender distrust of government does not appear to be well-founded. Public distrust can result whether or not the closed meeting was convened to take "official action."¹³⁵⁴

Unlike Georgia, most of the states that have considered the issue have included advisory committees within the scope of their open-meeting acts—some by explicit legislation¹³⁵⁵ and others by judicial or attorney general interpretation. In Florida, for example, the state supreme court, reasoning that advisory committee meetings fell within the sunshine law's provision for "the collective inquiry and discussion stages" of agency business, held that "any committee established by the Town Council to act in any type of advisory capacity would be subject to the provisions of [that] law."¹³⁵⁶ Simi-

1352. *McLarty v. Board of Regents*, 231 Ga. 22, 23, 200 S.E.2d 117, 119 (1973).

1353. The Georgia sunshine law requires "[a]ll meetings of any State department, agency, board, bureau, commission or political subdivision . . . at which official actions are to be taken" to be open to the public. GA. CODE ANN. § 40-3301(a) (Supp. 1974). Although the term "official actions" is ambiguous and could be read to exclude meetings at which no formal action is taken, such a reading seems inconsistent not only with the policies generally underlying open-meeting laws, see text at notes 1309-10 *supra*, but also with the intent of the Georgia legislature, which "substantially copied" the Florida act. See Note, *supra* note 1307, at 601-03.

1354. Cf. text at note 1434 *infra*.

1355. See, e.g., ALAS. STAT. § 44.62.310(a) (Supp. 1974); ILL. REV. STAT. ch. 102, § 42 (1973); KY. REV. STAT. § 61.805(2) (Supp. 1974); NEB. REV. STAT. § 84-1401 (Cum. Supp. 1974); ORE. REV. STAT. § 192.610 (1974); TENN. CODE ANN. § 8-4402 (Supp. 1974). In California, the original local government open-meeting act, the Brown Act, was interpreted as excluding advisory groups. See *Adler v. City Council*, 184 Cal. App. 2d 763, 7 Cal. Rptr. 805 (1960). In response, the legislature amended the act to include such committees. See CAL. GOVT. CODE § 54952.3 (West Supp. 1975); 42 OP. CAL. ATTY. GEN. 61, 64-65 (1963). Although the recently enacted state government open-meeting act, CAL. GOVT. CODE §§ 11120-31 (West Supp. 1975), does not include such a provision, the two acts parallel each other in most respects.

1356. *Town of Palm Beach v. Gradison*, 296 S.2d 473, 476-77 (1974) (emphasis added). With regard to advisory groups, the Florida Attorney General had originally taken the position that such groups are "not of the type commonly thought of as 'governmental' and thus [are] not within the purview of the 'Government in the Sunshine' Law." Op. Fla. Atty. Gen. No. 071-380 at 2 (Dec. 3, 1971). In an opinion issued about 18 months later, however, the Attorney General reconsidered his initial position. In Op. Fla. Atty. Gen. No. 073-159 (May 10, 1973), he analyzed the status of these groups less in terms of technical form and more in terms of whether open meetings at the advisory level would effectively serve the public interest. He found that, because of its expertise, the planning commission in question would play a very "sig-

larly, the Pennsylvania Attorney General has interpreted that state's act to extend to advisory committees.¹³⁵⁷ He emphasized that "[t]he Legislature intended the full decision-making process . . . to be revealed to public scrutiny and this intent may not be subverted by delegating authority to a group claimed to be beyond the scope of the Act."¹³⁵⁸

It is unfortunate that states such as California¹³⁵⁹ and Pennsylvania,¹³⁶⁰ which require advisory committees to conduct public meetings, permit "less-than-quorum-sized" groups to conduct closed sessions. The policies underlying open-meeting acts require that both types of groups be included in order to open the entire decision-making process to public scrutiny.¹³⁶¹

b. *Exemptions.* The second major provision that a comprehensive act should include is a specific list of exemptions: particular substantive matters that the legislature, after carefully balancing the countervailing public interests, determines may be discussed in closed session.¹³⁶² Any agency dealing with an exempt matter should be able to discuss it in executive session.¹³⁶³ However, when discussing

nificant role" in the decision-making process and that other bodies would "necessarily rely heavily" on its recommendations. *Id.* at 3. He therefore concluded "that the proceedings at the planning commission level [would] provide the best opportunity for both public input and public information," and that such meetings should be open to the public. *Id.* See also Op. Fla. Atty. Gen. No. 073-223 (June 20, 1973). In *Gradison*, the Florida court arguably went even further than the Attorney General by eliminating the necessity of examining the weight that will be given to the advice of a particular advisory group. *But see* Op. Fla. Atty. Gen. No. 074-267 at 1 (Sept. 5, 1974), in which the Attorney General still found it necessary to make such an examination.

1357. See Packel Letter, *supra* note 1330, at 1-2:

[I]f a body which is formally organized by statute, executive order, administrative directive or regulation, is delegated a function, even though wholly advisory, its meetings are also subject to the Act. The collective decisions of advisory boards, commissions and committees often provide the foundation upon which ultimate decisions are made, and the fact that a particular advisory group cannot bind its parent agency does not exempt the former from the Sunshine Law.

1358. *Id.* at 1. See also Op. Fla. Atty. Gen. No. 074-84 at 5 (March 25, 1974).

1359. See note 1355 *supra*. The same section of the Brown Act that expressly includes meetings of advisory groups, expressly excludes meetings of groups composed solely of members of a governing body when such a group numbers less than a quorum. See CAL. GOVT. CODE § 54952.3 (West Supp. 1975).

1360. See PA. STAT. ANN. tit. 65, §§ 261-62 (1974 Purdon's Legis. Serv. 480-81).

1361. Those states that impose a "quorum-limit" apparently do so in recognition of the fact that this is almost the only manageable (and meaningful) standard that does not prohibit all interaction among public officials. These states have apparently concluded that a standard that affords some certainty to the application of the law, even at the risk of evasion by some public officials, is superior to a law that has no real standards at all. For an attempt to create an alternative standard see Op. Fla. Atty. Gen. No. 071-32 (March 3, 1971).

1362. The considerations involved in determining whether particular matters should be exempted or not are essentially the same as those considered with regard to open-records laws. See text at notes 1207-40 *supra*.

1363. See *Laman v. McCord*, 245 Ark. 401, 405-06, 432 S.W.2d 753, 755-56 (1968).

all other matters, agencies covered by the statute should be required to meet in public.¹³⁶⁴

Where the legislature either fails to enumerate exempt substantive matters or unclearly defines the scope of a particular exemption, the courts, the attorney general, and the agencies themselves may face difficult interpretative questions with little more than a general policy of openness to guide them. In Florida, the courts have generally interpreted their act quite broadly¹³⁶⁵ and have been reluctant to read exemptions into a statute that recognizes no exemptions "except as otherwise provided in the constitution . . ."¹³⁶⁶ In *Times Publishing Co. v. Williams*,¹³⁶⁷ however, an intermediate Florida court recognized a limited exemption for consultations between an agency and its attorney regarding pending litigation.¹³⁶⁸ While such

1364. A distinction should be drawn between provisions that *exempt* matters from the operation of a sunshine law and provisions that *exclude* matters from the scope of such an act. The former provisions allow agencies that otherwise have to hold open meetings to conduct executive sessions when specified subject matters are to be discussed. The latter provisions allow specified government bodies to conduct executive sessions regardless of the subject matter to be discussed. One common exclusion covers judicial bodies (including juries) and quasi-judicial proceedings. See ALAS. STAT. §§ 44-62.310(d)(1), (2) (1973); ARIZ. REV. STAT. § 38-431.08 (1974); ARK. STAT. ANN. §§ 12-2803, -2805 (1968); CAL. GOVT. CODE § 11121 (West Supp. 1975); HAWAII REV. STAT. § 92-1(1) (1968); ILL. REV. STAT. ch. 102, § 42 (1973); IOWA CODE § 28A.6 (1971); KY. REV. STAT. § 61.810(4) (Supp. 1974); MASS. ANN. LAWS ch. 30A, § 11A (1973); MINN. STAT. ANN. § 471.705(1) (Supp. 1974); N.J. STAT. ANN. § 10:4-4 (Supp. 1974); N.M. STAT. ANN. § 5-6-23(E) (Supp. 1974); N.C. GEN. STAT. §§ 143-318.4(6), (8) (1974); ORE. REV. STAT. § 192.690 (1974); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(d) (Supp. 1974); VT. STAT. ANN. tit. 1, § 312 (Supp. 1974); VA. CODE ANN. § 2.1-345(6) (Supp. 1974); WASH. REV. CODE § 42.30.20(1)(a) (1974); WIS. STAT. ANN. § 66.77(4) (1974 West's Wis. Legis. Serv. 332). Many states also exclude parole and pardon boards. See ALAS. STAT. § 44.62.310(d) (Supp. 1974); CAL. GOVT. CODE § 11126 (West Supp. 1975); GA. CODE ANN. § 40-3302(b) (Supp. 1974); ILL. REV. STAT. ch. 102, § 42(b) (1973); KY. REV. STAT. § 61.810(1) (Supp. 1974); MINN. STAT. ANN. § 471.705(1) (Supp. 1974); N.J. STAT. ANN. § 10:4-4 (Supp. 1974); N.C. GEN. STAT. §§ 143-318.4(3), (4) (1974), *as amended*, (Supp. 1974); OHIO REV. CODE ANN. § 121.22 (Page 1969); ORE. REV. STAT. § 192.690 (1974); S.C. CODE ANN. § 1-20.3(c)(2) (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(p) (Supp. 1974); VA. CODE ANN. § 2.1-345(6) (Supp. 1974); WIS. STAT. ANN. § 66.77(4)(c) (1974 West's Wis. Legis. Serv. 332). A number of states exclude other specific agencies from their act's coverage. See, e.g., CAL. GOVT. CODE § 11126 (West Supp. 1975) (Alcoholic Beverage Appeals Bd., Franchise Tax Bd.); ILL. REV. STAT. ch. 102, § 42 (1973) (Commerce Commn.); MASS. ANN. LAWS ch. 30A, § 11A (1973) (Board of Bank Incorporation, General Insurance Guaranty Fund, Small Loans Regulatory Bd., State Tax Commn.); N.C. GEN. STAT. §§ 143-318.4(2), .5(a) (1974) (Board of Awards, Advisory Budget Commn.); S.C. CODE ANN. § 1-20.3(c)(2) (Supp. 1974) (State Election Commn.).

Although these exclusions are the result of a legislative balancing process similar to that involved in providing exemptions, and, although the excluded bodies or proceedings usually deal with a particular substantive matter that the legislature seeks to exempt, it is probably more appropriate to include exclusions as part of the general coverage provision and to segregate the substantive exemptions.

1365. See, e.g., Board of Pub. Instruction v. Doran, 224 S.2d 693, 699 (Fla. 1969).

1366. See, e.g., City of Miami Beach v. Berns, 245 S.2d 38, 41 (Fla. 1970), *construing* FLA. STAT. ANN. § 286.011(1) (Supp. 1974).

1367. 222 S.2d 470, 476 (Dist. Ct. App. 1969).

1368. See also Local 92, Am. Newspaper Guild v. Board of Supervisors, 263 Cal.

an exemption seems clearly reasonable in light of the state's interest in litigating on equal terms with other parties,¹³⁶⁹ the language of the Florida act required the court to find a constitutional basis for the exemption. Accordingly, it found that an attorney has a duty of confidentiality that derives from canons of ethics promulgated under state constitutional authority¹³⁷⁰ and that the legislature, "fully aware of its constitutional limitations . . . did not intend," by enacting the open-meeting law, to transgress this obligation.¹³⁷¹ Similarly, in *Bassett v. Braddock*,¹³⁷² the Florida supreme court, in order to exempt public employee collective bargaining from the open-meeting law, was forced to interpret the state constitutional provision concerning employee bargaining¹³⁷³ to so provide.¹³⁷⁴ Whatever the merits of these exemptions, and notwithstanding the courts' strained attempts to impute the exemptions to the intent of the legislature,¹³⁷⁵ it is clear that they are the product of "judicial legislation."¹³⁷⁶ It would seem to be in the long-run interest of the public to deter judicial tampering with the legislative mandate of openness as much as possible. Forcing the courts to carve exemptions may ultimately undermine the integrity of the law. A legislature should therefore—without sacrificing the interests of "freedom of information"—carefully articulate the desired exemptions.

A substantial number of states have attempted to avoid interpretative difficulties by exempting several broad categories of sub-

App. 2d 41, 69 Cal. Rptr. 480 (1968); *Society for Protection of N.H. Forests v. Water Supply & Pollution Control Commn.*, — N.H. —, 337 A.2d 788 (1975); 36 OP. CAL. ATTY. GEN. 175 (1960). *But see* *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968). Cf. note 1374 *infra* and accompanying text.

1369. See note 1382 *infra* (listing states that recognize such an exemption).

1370. 222 S.2d at 475.

1371. 222 S.2d at 476.

1372. 262 S.2d 425 (1972). See also 25 FLA. L. REV. 603 (1973).

1373. FLA. CONST. art. I, § 6.

1374. 262 S.2d at 426. The court also held that the school board may not be required to hold its conferences with its own negotiator in public. 262 S.2d at 428.

1375. In *Canney v. Board of Pub. Instruction*, 231 S.2d 34 (Fla. Dist. Ct. App. 1970), the court recognized an exemption from the sunshine law for quasi-judicial adjudications, reasoning that although the legislature could invest agencies with quasi-judicial authority, only the judicial branch could constitutionally regulate such functions. The Florida supreme court reversed, 278 S.2d 260 (1973), holding that "[t]he judiciary should not encroach upon the Legislature's right to require that the activities of the School Board be conducted in the 'sunshine.'" 278 S.2d at 264. The court observed that "[v]arious boards and agencies have obviously attempted to read exceptions into the Government in the Sunshine Law which do not exist. . . . If the board or agency feels aggrieved, then the remedy lies in the halls of the legislature and not in efforts to circumvent the plain provisions of the statute by devious ways in the hope that the judiciary will read some exceptions into the law." 278 S.2d at 264. See also 57 OP. CAL. ATTY. GEN. 189 (1974).

1376. See *Bassett v. Braddock*, 262 S.2d 425, 431 (Fla. 1972) (Adkins, J., dissenting).

stantive matters,¹³⁷⁷ including matters exempted by other laws,¹³⁷⁸ security and law enforcement matters,¹³⁷⁹ personal privacy matters,¹³⁸⁰ matters concerning internal agency operations,¹³⁸¹ and matters affect-

1377. Since these exemptions vary greatly among the states, and since an analysis of them would closely parallel the analysis of the exemptions contained in state open-records acts, *see* text at notes 1207-40 *supra*, their specifics will not be considered here.

1378. *See, e.g.*, ALAS. STAT. § 44.62.310(c)(3) (Supp. 1974); ILL. REV. STAT. ch. 102, § 42 (1973); IOWA CODE § 28A.1 (1971); KAN. STAT. ANN. § 75-4318 (Supp. 1974); ME. REV. STAT. ANN. tit. 1, § 403 (1964); MASS. ANN. LAWS ch. 30A, § 11A (1973); MINN. STAT. ANN. § 471.705(1) (Supp. 1974); MO. REV. STAT. § 610.025(5) (Cum. Supp. 1973); MONT. REV. CODES ANN. § 82-3402 (1966); NEB. REV. STAT. § 84-1401 (Cum. Supp. 1974); S.C. CODE ANN. §§ 1-20.3(a), (c), (e) (Supp. 1973); S.D. COMP. LAWS ANN. §§ 1-25-1 to -2 (1974); TEX. REV. CIV. STAT. ANN. art. 6252-17, §§ 2(a), (b), (k) (Supp. 1974); VA. CODE ANN. § 2.1-343 (1973), *as amended*, (Supp. 1974); VT. STAT. ANN. tit. 1, § 312 (Supp. 1974); WYO. STAT. ANN. § 9-692.12(a) (Supp. 1973).

The specific language of this exemption varies from state to state and the scope of its application may differ significantly depending on the exact words used. *Compare* KY. REV. STAT. § 61.810(1) (1974) ("meetings which federal or state law specifically require to be conducted in privacy"), *with* N.J. STAT. ANN. § 10:4-4 (Supp. 1974) ("where contrary provision is made by law").

1379. *See, e.g.*, CAL. GOVT. CODE § 11126 (West Supp. 1975); MASS. ANN. LAWS ch. 30A, § 11A (1973); MONT. REV. CODES ANN. §§ 82-3402(1), (6) (1966); S.C. CODE ANN. § 1-20.3(c)(4) (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(j) (Supp. 1974); VT. STAT. ANN. tit. 1, § 313(a)(5) (Supp. 1974); WASH. REV. CODE § 42.30.110 (1974); WIS. STAT. ANN. § 66.77(4)(c) (1974 West's Wis. Legis. Serv. 332); WYO. STAT. ANN. §§ 9-692.14(a)(i), (iv) (Supp. 1973). *See also* GA. CODE ANN. § 40-3302(c) (Supp. 1974); MO. REV. STAT. § 610.025(3) (Cum. Supp. 1973); N.C. GEN. STAT. § 143-318.4(5) (1974) (all excluding agencies dealing with law enforcement or security matters); Common Cause Proposed Act, *supra* note 1309, § 5(a)(3).

1380. *See, e.g.*, ALA. CODE tit. 14, § 393 (1958) ("character or good name of a woman or man"); ALAS. STAT. § 44.62.310(c)(2) (1973) ("subjects that tend to prejudice the reputation and character of any person"); GA. CODE ANN. §§ 40-3302(e), -3303(b) (Supp. 1973) (meetings of public hospital committees concerning abortions, confidential tax matters); ILL. REV. STAT. ch. 102, § 42 (1973) (school board disciplinary hearings, matters of professional ethics or performance); KY. REV. STAT. § 61.810(6) (Supp. 1974) (student or employee problems "provided that this exception is designed to protect the reputation of individual persons and shall not be interpreted to permit discussion of general personnel matters in secret"); MASS. ANN. LAWS ch. 30A, § 11A (1973) (matters that would "adversely affect . . . the reputation of any person"); MO. REV. STAT. §§ 610.025(1), (4) (Cum. Supp. 1973) (illegitimacy and adoption court proceedings, mental health proceedings, student problems); N.H. REV. STAT. ANN. § 91-A:3(II)(c) (Supp. 1973) ("matters, which, if discussed in public, would be likely to affect adversely the reputation of any person"); N.C. GEN. STAT. §§ 143-318.3(a)(4), (b) (1974) (privileged relationships, student disciplinary proceedings); S.C. CODE ANN. § 1-20.3(b)(3) (Supp. 1974) ("private matters presented by individuals or groups of citizens"); S.D. COMP. LAWS ANN. § 1-25-2 (1974) (student, employee, and personnel matters); TEX. REV. CIV. STAT. ANN. art. 6252-17, §§ 2(h), (o) (Supp. 1974) (school disciplinary hearings, meetings of medical boards considering disability benefit claims); VA. CODE ANN. § 2.1-344(a)(3) (1973) ("protection of privacy of individuals in personal matters not related to public business"); WASH. REV. CODE § 42.30.140(1) (1974) (occupational and professional disciplinary proceedings); WIS. STAT. ANN. § 66.77(4)(e) (1974 West's Wis. Legis. Serv. 332) (financial, social, and other data "which may unduly damage reputations"); WYO. STAT. ANN. § 692.14(xi) (Supp. 1973) (student disciplinary proceedings). *See also* MONT. CONST. art. II, § 9 ("except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure"); Common Cause Proposed Act, *supra* note 1309, § 5(a)(1).

1381. Many of these provisions exempt not only matters concerning internal agency administration, but also matters affecting individual agency personnel. Thus, these provisions might also have been categorized as privacy exemptions, as was KY. REV.

ing financial or legal interests of the state.¹³⁸² One exemption found

STAT. § 61.810(6) (Supp. 1974), *quoted in note 1380 supra*. See, e.g., ARK. STAT. ANN. § 12-2805 (1968); ILL. REV. STAT. ch. 102, § 42 (Supp. 1973); IOWA CODE § 28A.3 (1971); MO. REV. STAT. § 610.025(4) (Supp. 1974); N.C. GEN. STAT. § 143-318.3(b) (1974); OKLA. STAT. ANN. tit. 25, § 201 (Supp. 1974); S.C. CODE ANN. § 1-20.3(b)(1) (Supp. 1974); S.D. COMP. LAWS ANN. § 1-25-2 (1974); VA. CODE ANN. § 2.1-344(1) (1973), *as amended*, (Supp. 1974).

Other states have similar exemptions but require a public hearing if the person in question so requests. See, e.g., ARIZ. REV. STAT. § 38-431.03(A)(1) (1974); CAL. GOVT. CODE § 11126 (West Supp. 1975); GA. CODE ANN. § 40-3302(f) (Supp. 1974); MONT. REV. CODES ANN. §§ 82-3402(2), (3) (1966); NEV. REV. STAT. § 241.030 (1973); N.H. REV. STAT. ANN. § 91-A:3(II)(A) (Supp. 1973); N.M. STAT. ANN. § 5-6-23(E) (Supp. 1974); ORE. REV. STAT. §§ 192.660(a), (b) (1973); PA. STAT. ANN. tit. 65, § 263 (1974 Purdon's Pa. Legis. Serv. 481); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(g) (Supp. 1974); VT. STAT. ANN. tit. 1, §§ 313(a)(3), (4) (Supp. 1974); WASH. REV. CODE § 42.30.110 (1974); WIS. STAT. ANN. § 66.77(4)(b) (1974 West's Wis. Legis. Serv. 332); WYO. STAT. ANN. § 9-692.14(a)(ii) (Supp. 1973).

1382. See, e.g., ALAS. STAT. § 44.62.310(c)(1) (1973) ("matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the governmental unit"); ARIZ. REV. STAT. §§ 38-431.03(A)(3), (4), (5) (1974) (collective bargaining issues, consultations with attorneys, international or interstate negotiations); CAL. GOVT. CODE § 11126 (West Supp. 1975) (site selections for state colleges, investment decisions regarding retirement funds, sessions relating to salaries and benefits); GA. CODE ANN. §§ 40-3302(d), -3303(a) (Supp. 1974) (future acquisition of real estate, attorney-client privilege); ILL. REV. STAT. ch. 102, § 42 (1973) (collective bargaining, acquisition of real property, litigation involving the agency); IOWA CODE § 28A.3 (1971) (proposed purchase of real estate); KY. REV. STAT. §§ 61.810(2), (3), (5), (7) (Supp. 1974) (real estate matters when publicity would be likely to affect its value, litigation, collective bargaining negotiations, meetings between agencies and industrial prospects); MASS. ANN. LAWS ch. 30A, § 11A (1973) (matters that would "adversely affect . . . the financial interests of the Commonwealth"); MO. REV. STAT. § 610.025(2) (Cum. Supp. 1973) (litigation involving the agency, acquisition of real estate if public knowledge might adversely affect value); MONT. REV. CODES ANN. § 82-3402(4) (1966) (purchases and investments that, if made public, would adversely affect financial interests of the state); N.H. REV. STAT. ANN. § 91-A:3(II)(d) (Supp. 1973) (dealings in real estate "which, if discussed in public, would be likely to benefit a party, or parties whose interests are adverse to those of the general community"); N.J. STAT. ANN. § 10:4-4 (Supp. 1974) (investment of public funds "where the accomplishment of the object . . . is likely to be materially prejudiced"); N.C. GEN. STAT. §§ 143-318.3(a)(1), (2), (5) (1974) (acquisition of property, negotiations between public employers and their employees, conferences with legal counsel regarding litigation); ORE. REV. STAT. §§ 192-660(2)(a), (c) (1974) (certain deliberations relating to labor negotiations, real estate purchases, preliminary negotiations regarding trade and commerce where Oregon is in competition with other states or nations); PA. STAT. ANN. tit. 65, § 263 (1974 Purdon's Pa. Legis. Serv. 481) (labor negotiations); S.C. CODE ANN. § 1-20.3(b)(2) (Supp. 1974) (negotiations incident to proposed contracts or land sales, consideration of litigation or "the position of the public agency in other adversary situations"); TEX. REV. CIV. STAT. ANN. art. 6252-17, §§ 2(e), (f), (m) (Supp. 1974) (litigation, real estate and contract deliberations, school board discussions of employee relations); VT. STAT. ANN. tit. 1, §§ 313(1), (2) (Supp. 1974) (contracts and litigation "where premature general public knowledge would place the state at a substantial disadvantage," real estate transactions); VA. CODE ANN. §§ 2.1-344(a)(2), (4), (5), (6) (1973) (acquisition or sale of real property, discussion of prospective business or industry for the community, investment of public funds, litigation); WASH. REV. CODE § 42.30.110 (1974) (purchase of real property, hearings of complaints against public officials and employees); WIS. STAT. ANN. §§ 66.77(4)(d), (f) (1974 West's Wis. Legis. Serv. 332) (litigation, acquisition of property, labor negotiations); WYO. STAT. ANN. §§ 9-692.14(a)(iii), (vii), (x) (Supp. 1973) (litigation, real estate acquisition, wage and salary negotiations). See also Common Cause Proposed Act, *supra* note 1309, § 5(a)(2).

in a number of state open-meeting acts merits separate consideration. This exemption allows a government body to convene in executive session whenever a prescribed proportion of the membership so determines, despite the fact that the subject discussed does not fall within a specific substantive exemption.¹³⁸³ In an attempt to curtail the abuse of these exemptions, most such states require that no binding action be taken at these closed meetings.¹³⁸⁴ Despite this "safeguard," however, exemptions of this type may significantly undermine the policy behind open-meeting requirements and therefore should not be incorporated into open-meeting laws.

c. *Enforcement procedures.* A comprehensive open-meeting act should establish procedures whereby any individual can compel any agency subject to the act to conform to its requirements.¹³⁸⁵ While it is essential to determine the effect to be given actions taken in violation of the act,¹³⁸⁶ remedies must also be available to prevent impending violations.¹³⁸⁷ The availability of expeditious relief is

1383. See, e.g., CONN. GEN. STAT. ANN. § 1-21 (1969), as amended, (Supp. 1975) (majority vote); HAWAII REV. STAT. § 92-3 (1968) (two-thirds vote); IOWA CODE § 28A.3 (1971) (two-thirds vote); KAN. STAT. ANN. § 75-4319 (Supp. 1974) (majority vote); LA. REV. STAT. ANN. § 42:6 (West 1965) (majority vote); ME. REV. STAT. ANN. tit. 1, § 404 (1964) (majority vote); NEB. REV. STAT. § 84-1405 (Cum. Supp. 1974) (majority vote). See also IND. CODE § 5-14-1-5 (1971); MD. ANN. CODE art. 41, § 14 (1971); N.H. REV. STAT. ANN. § 91-A:3(I) (Supp. 1973); UTAH CODE ANN. § 52-4-3 (1970).

1384. See, e.g., KAN. STAT. ANN. § 75-4319 (Supp. 1973); LA. REV. STAT. ANN. § 42:6 (1965); ME. REV. STAT. ANN. tit. 1, § 404 (1964); N.H. REV. STAT. ANN. § 91-A:3(I) (Supp. 1973); UTAH CODE ANN. § 52-4-3 (1970). Cf. IND. CODE § 5-14-1-5 (1971).

1385. Some states grant standing under their open-meeting laws to any citizen or any person. See, e.g., CAL. GOVT. CODE § 11130 (West Supp. 1975); FLA. STAT. ANN. § 286.011(2) (Supp. 1974); GA. CODE ANN. § 40-3301(b) (Supp. 1974); KY. REV. STAT. § 61.845 (Supp. 1974); ME. REV. STAT. ANN. tit. 1, § 406 (1964); MINN. STAT. ANN. § 471.705(2) (Supp. 1974); PA. STAT. ANN. tit. 65, § 269 (1974 Purdon's Pa. Legis. Serv. 482); S.C. CODE ANN. § 1-20.4 (Supp. 1974). Other states limit standing to person aggrieved, affected, or denied rights. See, e.g., ARIZ. REV. STAT. § 38-431.07 (1974); ARK. STAT. ANN. § 12-2806 (1968); IND. ANN. STAT. CODE § 5-14-1-6(c) (Burns 1974); N.H. REV. STAT. ANN. § 91-A:7 (Supp. 1973); N.C. GEN. STAT. § 143-318.6 (1974); ORE. REV. STAT. § 192.680 (1974); VA. CODE ANN. § 2.1-346 (1973). Wisconsin allows an individual to bring suit if the district attorney has not commenced an action within 20 days of receipt of the individual's verified complaint. WIS. STAT. ANN. § 66.77(10) (1974 West's Wis. Legis. Serv. 333). The New Mexico act, N.M. STAT. ANN. §§ 5-6-25(B), (D) (Supp. 1974), provides that the act may be enforced either by a group of five individuals or by the attorney general. See also Common Cause Proposed Act, *supra* note 1309, §§ 9(a), (b). Cf. text at notes 1271-79 *supra*.

In the absence of a standing provision, an individual may have no recourse except to petition the state to institute proceedings. See, e.g., *State ex rel. Adams v. Rockwell*, 167 Ohio St. 15, 145 N.E. 2d 665 (1957); *State ex rel. Wineholt v. Superior Court*, 249 Ind. 152, 230 N.E.2d 92 (1967). Some courts, however, will allow individuals to sue for enforcement of an open-meeting act even when there has been no statutory grant of standing. See, e.g., *Green v. Beste*, 76 N.W.2d 165 (N.D. 1956). Cf. IND. ANN. STAT. CODE § 5-14-1-6(b) (Burns 1974); *Acord v. Booth*, 33 Utah 279, 93 P. 734 (1908).

1386. See text at notes 1392-415 *infra*.

1387. A number of states expressly authorize courts to grant prospective relief. See, e.g., ARIZ. REV. STAT. §§ 38-431.04, .07 (1974); CAL. GOVT. CODE § 11130 (West Supp. 1975); FLA. STAT. ANN. § 286.011(2) (Supp. 1974); GA. CODE ANN. § 40-3301 (Supp. 1974);

even more important under an open-meeting law than under an open-records act.¹³⁸⁸ It is probable that exclusion of the public from an improperly closed session of a government body can never adequately be remedied, even if only "preliminary deliberations" have taken place.¹³⁸⁹

In authorizing the courts to enforce the act, the legislature should establish guidelines prescribing the circumstances in which prospective relief, such as an injunction or writ of mandamus, is appropriate. Since the standards for granting prospective relief are generally left to the discretion of the courts, they may, in the absence of any legislative declaration of policy, refuse to act unless shown evidence of "irreparable injury" to the particular plaintiff¹³⁹⁰ or a history of violations by the government body involved.¹³⁹¹

ILL. REV. STAT. ch. 102, § 43 (1973); IND. ANN. STAT. CODE § 5-14-1-6(c) (Burns 1974); IOWA CODE § 28A.7 (1971); KY. REV. STAT. § 61.845 (1974); MASS. ANN. LAWS ch. 39, § 23C (Supp. 1974); MO. REV. STAT. § 610.030 (Cum. Supp. 1973); N.H. REV. STAT. ANN. § 91-A:7 (Supp. 1973); N.M. STAT. ANN. § 5-6-25(B) (Supp. 1974); N.C. GEN. STAT. § 143-318.6 (1974); ORE. REV. STAT. § 192.680 (1974); PA. STAT. ANN. tit. 65, § 269 (1974 Purdon's Pa. Legis. Serv. 482); S.C. CODE ANN. § 1-20.4 (Supp. 1974); TENN. CODE ANN. § 8-4406(a) (Supp. 1974); VA. CODE ANN. § 2.1-346 (1973); WASH. REV. CODE § 42.30.130 (1974). A Florida court took an interesting view of such a provision and held that any attempt by the legislature "to dictate to . . . courts when, how or under what conditions injunctions should issue . . . would constitute an unlawful legislative infringement on a judicial function." *Times Publishing Co. v. Williams*, 222 S.2d 470, 476 (Fla. Dist. Ct. App. 1969).

As well as providing citizens with a means for prospective relief, it is also important that an open-meeting act grant authority to the courts to assess the costs of an enforcement proceeding, including reasonable attorney fees, against an agency or against agency members that have violated the act. Without such a provision many individuals will be deterred from enforcing the act by the prohibitive costs necessarily incurred in an enforcement proceeding. See Letter from Jon Mills, Center for Governmental Responsibility, University of Florida Law School, to Senator Lawton Chiles, Oct. 30, 1974 in *Open-Meeting Hearings*, *supra* note 1309, at 379. Although the Florida act contains no provision authorizing the award of court costs, in *Hough v. Stembridge*, 278 S.2d 288 (Fla. Dist. Ct. App. 1973), the trial court assessed certain costs against named defendants on a pro rata basis. The appellate court did not discuss the issue. Cf. *Haven v. City of Troy*, 39 Mich. App. 219, 197 N.W.2d 496 (1972) (assessing costs against the plaintiff even though he prevailed at trial and on appeal). A few state acts do include a provision allowing the courts to assess costs against agencies. E.g., ARIZ. REV. STAT. § 38-431.07 (1974); ORE. REV. STAT. § 192.680 (1974); WIS. STAT. ANN. § 66.77(10) (1974 West's Legis. Serv. 333).

1388. When a meeting is called on short notice, action to prevent the meeting from being closed to the public often must be taken quickly. Thus, an expedited hearing procedure for actions challenging the closing of a meeting is an essential element of any open-meeting law. *Open-Meeting Hearings*, *supra* note 1309, at 267 (statement of D. Wickham). A few states include provisions for such a procedure in their acts. See, e.g., ARK. STAT. ANN. § 12-2806 (1968); MASS. ANN. LAWS ch. 39, § 23C (Supp. 1974); N.H. REV. STAT. ANN. § 91-A:7 (Supp. 1973); VA. CODE ANN. § 2.1-346 (1973).

1389. Cf. text at notes 1347-50 *supra*.

1390. But see *Times Publishing Co. v. Williams*, 222 S.2d 470, 476 (Fla. Dist. Ct. App. 1969), interpreting the Florida legislature's grant of jurisdiction to issue injunctions as "the equivalent of a legislative declaration that a violation of the statutory mandate constitutes an irreparable public injury The effect of such a declaration in a subsequent judicial proceeding, then, would be that one of the requisites for a writ of injunction need not be proven, i.e., an irreparable injury; and a mere showing

d. *Invalidation provisions.* A comprehensive open-meeting act should establish procedures for invalidating actions taken at an improperly closed meeting. Procedures of this kind are necessary both to describe the effect of a particular action taken when prospective relief is either unavailable or ineffective, and to deter future violations.

Admittedly, an invalidation remedy is inherently limited and is not without costs.¹³⁹² Although some courts have invalidated publicly made decisions that were the direct result of improperly closed deliberations,¹³⁹³ it is not likely that invalidation can eliminate the effect of prior deliberations or discussions. Furthermore, whatever its effectiveness in deterring future violations of the act, invalidation of actions otherwise properly taken may unfairly disadvantage persons relying on the validity of such actions.¹³⁹⁴ At the very least, the potential for invalidation will create substantial uncertainty.¹³⁹⁵ Despite these limitations, and notwithstanding the availability of sanctions against individual officials,¹³⁹⁶ invalidation seems the most effective device to compel compliance with the mandate of openness.¹³⁹⁷

that the statute has been or is clearly about to be violated fully satisfies such requirement."

1391. Two state statutes do provide standards for granting prospective relief: MASS. ANN. LAWS ch. 39, § 23C (Supp. 1974) (requiring proof of past violation), and ILL. REV. STAT. ch. 102, § 43 (1973) (allowing mandamus to issue "where the provisions of this Act are not complied with" or upon a showing of probable cause that they will not be complied with). Because of the difficulty of demonstrating the probability of future violations, the citizenry in other jurisdictions may have to endure one or more violations of the open-meeting laws before a court will enjoin future violations, Comment, 8 U. RICH. L. REV. 261, *supra* note 1306, at 268-69, although the possibility of contempt penalties should help to ensure future compliance. See generally Note, *supra* note 1306, at 1215.

1392. See generally Note, *supra* note 1306, at 1213-14.

1393. See, e.g., *Bigelow v. Howze*, 291 S.2d 645 (Fla. Dist. App. 1974); *Kramer v. Board of Adjustment*, 80 N.J. 454, 194 A.2d 26 (L. Div. 1963). But see *Herron v. Northwood*, 111 N.H. 324, 282 A.2d 661 (1971); *Schults v. Board of Educ.*, 86 N.J. Super. 29, 205 A.2d 762 (1964), *affd.*, 45 N.J. 2, 210 A.2d 762 (1965); *In re Housing Authority*, 62 Wash. 2d 492, 383 P.2d 295 (1964), *cert. denied*, 376 U.S. 909 (1964).

1394. Note, *supra* note 1306, at 1213-14; 49 TEXAS L. REV. 764, 776 (1971).

1395. Note, *supra* note 1306, at 1213-14. It is possible that the costs of invalidation outweigh the benefits of this sanction, however important the latter might be. Note, *Government in the Sunshine: Judicial Application and Suggestions for Reform*, 2 FLA. ST. U. L. REV. 535, 556 (1974). See *Elmer v. Board of Zoning Adjustment*, 343 Mass. 24, 27, 176 N.E.2d 16, 18 (1961). The Florida Attorney General has stated that "an en masse declaration of unconstitutionality of thousands of enactments throughout the nation without any consideration being given to the substantive content of the enactments or the procedures involved in the enactment of any individual statute or ordinance, could serve no purpose but to throw organized societies of people and their local governments into panic and confusion." Op. Fla. Atty. Gen. No. 071-32, at 15 (March 3, 1971).

1396. See text at notes 1416-22 *infra*.

1397. 49 TEXAS L. REV. 764, 776 (1971); Detroit Free Press, Aug. 30, 1974, § C, at 6, col. 3 (metro ed.). But see Note, *supra* note 1306, at 1214.

The importance of including an invalidation provision in an open-meeting law is demonstrated by the unwillingness of many courts to imply such a remedy in the absence of express authorization from the legislature. Some courts justify their reluctance to vacate agency action by describing their statutes as merely "directory" because they provide no method of enforcement and fail to specify that action taken in violation of their requirements is invalid.¹³⁹⁸ Such an analysis simply begs the question. Other courts have relied on canons of statutory construction to reason that since the legislature included remedies other than invalidation in the act, it must have intended those remedies to be exclusive.¹³⁹⁹ In *Dobrovolny v. Reinhardt*,¹⁴⁰⁰ for example, the Iowa supreme court interpreted the state open-meeting act, which provides that it "may be enforced by mandamus or injunction, whether or not any other remedy is also available,"¹⁴⁰¹ to preclude any judicial authority to "render the actions of [a] public body void or voidable."¹⁴⁰²

Some courts, in considering whether to imply an invalidation remedy, have gone beyond such limited modes of analysis to examine the policies underlying open-meeting acts. In states where the act is silent on the issue of enforcement or sanctions, a few courts have been willing to imply such a remedy.¹⁴⁰³ Where remedies are already provided, at least two state courts have rejected the "exclusive remedies" construction as inconsistent with the open-meeting principle.¹⁴⁰⁴ One of these courts commented:

While the statute provides a [criminal] remedy against the members of the Authority for a violation thereof such remedy is not exclusive; were it otherwise, the entire purpose of the statute would be nullified and the statute could be violated by members of the Authority with particular impunity. In order to require the Authority to live up

1398. See, e.g., *Sullivan v. Credit River Township*, — Minn. —, 217 N.W.2d 502 (1974). See also *Adler v. City Council*, 184 Cal. App. 2d 763, 764, 7 Cal. Rptr. 805, 812 (1960).

1399. See, e.g., *Adler v. City Council*, 184 Cal. App. 2d 763, 7 Cal. Rptr. 805 (1960).

1400. 173 N.W.2d 837 (1970).

1401. IOWA CODE § 28A.7 (1971).

1402. 173 N.W.2d at 841. The violation complained of in *Dobrovolny* had occurred before the suit was brought. The court found that neither an injunction nor mandamus (the act's specified remedies) would be appropriate to compel reconsideration of action already taken at an illegal meeting. 173 N.W.2d at 841. Thus the court precluded effective enforcement of the act for past violations. See Comment, *supra* note 1309, at 220.

1403. See, e.g., *Hamrick v. Town of Albertville*, 219 Ala. 465, 122 S. 448 (1929); *Town of Paradise Valley v. Acker*, 100 Ariz. 62, 411 P.2d 168 (1966); *City of Lexington v. Davis*, 310 Ky. 751, 221 S.W.2d 659 (1949); *Haven v. City of Troy*, 39 Mich. App. 219, 197 N.W.2d 496 (1972); *Green v. Beste*, 76 N.W.2d 165 (N.D. 1956). See also Comment, 8 U. RICH. L. REV. 261, *supra* note 1306, at 269-70.

1404. See *Bogert v. Allentown Housing Authority*, 426 Pa. 151, 231 A.2d 147 (1967); *Toyah Independent School Dist. v. Pecos-Barstow Independent School Dist.*, 466 S.W.2d 377 (Tex. Ct. Civ. App. 1971).

to the mandate of the "Right to Know" statute, plaintiffs had to resort to equity or other appropriate remedy.¹⁴⁰⁵

Although this reasoning seems consistent with the purposes of open-meeting acts, not all courts have found it persuasive; thus legislatures should be explicit in providing for invalidation.

If a legislature chooses to include an invalidation clause in its act, it should clarify whether finding a violation automatically renders the action taken void or whether the courts have some discretion in this regard. A number of states expressly provide that actions taken at improperly closed meetings are "null and void" or "invalid,"¹⁴⁰⁶ while others provide only that such actions are "not binding,"¹⁴⁰⁷ a phrase that may obscure the legislature's intent. Thus, in Florida the Attorney General and the supreme court have interpreted this language quite differently. According to the Attorney General, this language

does not require each and every violative action by every board and commission in the state to be deemed a nullity, wholly void *ab initio* and as though never enacted. It means rather that individual actions taken by boards and commissions in violation of the statutory inhibition are individually voidable and thus subject to challenge by persons with proper standing to sue in court cases. To hold otherwise would be to create public chaos¹⁴⁰⁸

The court, without reference to the Attorney General's opinion, subsequently said: "Mere showing that the government in the sunshine law has been violated constitutes an irreparable public injury so that the ordinance is void *ab initio*."¹⁴⁰⁹

Even where the open-meeting act clearly specifies that actions taken in violation of it are only "voidable" in a court proceeding,¹⁴¹⁰

1405. *Bogert v. Allentown Housing Authority*, 426 Pa. 151, 157, 231 A.2d 147, 150 (1967).

1406. See, e.g., ALAS. STAT. § 42.62.310(f) (1967); ARIZ. REV. STAT. § 38-431.05 (1974); COLO. REV. STAT. ANN. §§ 24-6-402(4), 29-9-101(2) (1973); IND. ANN. STAT. CODE § 5-14-1-6 (Burns 1974); NEB. REV. STAT. § 84-1405 (Cum. Supp. 1974); N.M. STAT. ANN. § 5-6-25(A) (Supp. 1974); OKLA. STAT. ANN. tit. 25, § 201 (Supp. 1974); PA. STAT. ANN. tit. 65, § 262 (1974 Purdon's Pa. Legis. Serv. 481); TENN. CODE ANN. § 8-4405 (Supp. 1974) (adding a proviso stating "that nullification . . . shall not apply to any commitment, otherwise legal, affecting the public debt of the entity concerned"); WASH. REV. CODE § 42.30.060 (1974); WYO. STAT. ANN. § 9-692.12(a) (Supp. 1973). See *School Dist. No. 354 v. Mead Educ. Assn.*, — Wash. —, —, 530 P.2d 302, 305 (1975) (interpreting Wash. Rev. Code § 42.30.060 (1974)).

1407. See, e.g., FLA. STAT. ANN. § 286.011(1) (Supp. 1974); GA. CODE ANN. § 40-3301(a) (Supp. 1974); VT. STAT. ANN. tit. 1, § 312(a) (Supp. 1974). The Arkansas statute provides that no action taken at an improperly closed meeting shall be "legal." ARK. STAT. ANN. § 12-2805 (1968). In Virginia, actions are not "effective" unless the open-meetings act is complied with. See VA. CODE ANN. § 2.1-344(c) (1973).

1408. Op. Fla. Atty. Gen. No. 071-32, at 14-15 (March 3, 1971).

1409. *Town of Palm Beach v. Gradison*, 296 S.2d 473, 477 (1974).

1410. See, e.g., KY. REV. STAT. § 61.830 (Supp. 1974); N.J. STAT. ANN. § 10:4-5 (Supp. 1974); WIS. STAT. ANN. § 66.77(3) (1974 West's Wis. Legis. Serv. 332).

a court may still be unsure of the standards to be applied in judging a particular action. The only case to consider this problem interpreted such a provision as creating a strong presumption of invalidity upon the finding of a violation:

Appropriate implementation of [the policy behind the act] calls, as a general rule, for the Superior Court . . . to set aside any official action, . . . which is taken without compliance with the prescriptions of the statute We need not now decide that no discretion is ever to be reserved to the court to save the validity of official action taken in contravention of the statute. That question may be left to await a case where a sufficiently impelling counter-interest may be argued to bespeak sustaining the action impugned. It suffices here to say that mere absence of bad faith or other impropriety on the part of the public body should not ordinarily move the court to stay its hand in voiding official action taken contrary to the statute upon proper application therefor.¹⁴¹¹

This statement suggests that there may be no practical difference between a mandatory invalidation provision and a discretionary invalidation provision when the latter, as here, is interpreted narrowly.

Perhaps the most significant problem with any invalidation remedy is delimiting its scope: The steps required to "re-validate" a nullified action have to be determined.¹⁴¹² It seems clear that there must be some method by which a government body can "cure" the defects of its original proceedings; the public interest would be diserved if a court—assuming it possessed such power—*permanently* invalidated a particular course of action simply because it was first adopted at a meeting in violation of the act. Probably the most that the courts can do is to require a complete reconsideration of the matter at issue, with full opportunity for public observation and input.

Because none of the state acts prescribe standards for determining what constitutes an appropriate cure, courts have been forced to develop their own guidelines. Some courts have considered even perfunctory re-votes sufficient if conducted in public.¹⁴¹³ Other courts, while failing to make their standards explicit, have required substantially more.¹⁴¹⁴ It is clear, however, that if curative proceedings are to serve the policy underlying open-meeting acts, they must

1411. *Wolf v. Zoning Bd. of Adjustment*, 79 N.J. Super. 546, 553, 192 A.2d 305, 308-09 (1963).

1412. See generally Note, *An Extension of the Public Meeting Principle*, 46 CHI-KENT L. REV. 207 (1969).

1413. See, e.g., *Bassett v. Braddock*, 262 S.2d 425, 428-29 (Fla. 1972); *State ex rel. Wincholt v. Superior Court*, 249 Ind. 152, 156, 230 N.E.2d 92, 94-95 (1967).

1414. See, e.g., *Scott v. Bloomfield*, 94 N.J. Super. 592, 600, 229 A.2d 667, 671 (L. Div.), *affd.*, 98 N.J. Super. 321, 237 A.2d 297 (App. Div. 1967).

be more than a public ratification of a decision previously made behind closed doors. Such proceedings must at least allow the public to contribute to the decision-making process and to learn the premises relied upon by their representatives. While this process may not alter the ultimate result, it will foster public confidence in government and will impress upon agency officials the importance of complying with the act.¹⁴¹⁵

e. *Sanctions.* Finally, a comprehensive open-meeting law should include a provision indicating an appropriate sanction to be applied to individual officials who violate the act. While there is every reason to expect that injunctive relief will be effective,¹⁴¹⁶ an additional sanction applicable to individual violators should be available. The mere existence of such a sanction may be an effective deterrent to potential violators.¹⁴¹⁷

Most open-meeting acts contain a provision making violation of the act a misdemeanor.¹⁴¹⁸ Because some courts are reluctant to apply criminal penalties,¹⁴¹⁹ especially when there is no proof of scienter,¹⁴²⁰ an alternative sanction should be devised. A few acts contain a provision for assessing a civil fine against offending officials.¹⁴²¹ The most effective sanction, however, might be removing willful violators from office.¹⁴²²

1415. See Comment, *supra* note 1210, at 1664-65.

1416. See generally Note, 2 FLA. ST. U. L. REV. 535, *supra* note 1395, at 549; Note, *supra* note 1306, at 1215; Comment, *supra* note 1307, at 1179-80.

1417. But see 49 TEXAS L. REV. 764, 773-74 (1971).

1418. See, e.g., ALA. CODE tit. 14, § 394 (1958); ARIZ. REV. STAT. § 38-431.06 (1974); ARK. STAT. ANN. § 12-2807 (1968); FLA. STAT. ANN. § 286.011(3) (Supp. 1973); GA. CODE ANN. §§ 40-3301(c), -9911 (Supp. 1974); ILL. REV. STAT. ch. 102, § 44 (1973); IND. ANN. STAT. CODE § 5-14-1-6(a) (Burns 1974); IOWA CODE § 28A.8 (1971); KAN. STAT. ANN. § 75-4320 (Supp. 1974); KY. REV. STAT. § 61.991 (Supp. 1974); LA. REV. STAT. ANN. § 42:9 (West Supp. 1975); ME. REV. STAT. ANN. tit. 1, § 406 (1964); NEB. REV. STAT. § 84-1404 (Cum. Supp. 1974); NEV. REV. STAT. § 241.040 (1973); N.M. STAT. ANN. § 5-6-26 (Supp. 1974); OKLA. STAT. ANN. tit. 25, § 202 (Supp. 1974); PA. STAT. ANN. tit. 65, § 268 (1974 Purdon's Pa. Legis. Serv. 482); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 4 (Supp. 1974); UTAH CODE ANN. § 52-4-4 (1970).

The penalties imposed for violations vary greatly among the states. Compare NEB. REV. STAT. § 84-1404 (Cum. Supp. 1974) (allowing imposition of a fine not exceeding \$25) with LA. REV. STAT. ANN. § 42:9 (West Supp. 1975) (\$2000 maximum fine) and ME. REV. STAT. ANN. tit. 1, § 406 (1964) (up to one year's imprisonment).

1419. See Comment, *supra* note 1210, at 1662; Comment, *supra* note 1309, at 216.

1420. See, e.g., Board of Pub. Instruction v. Doran, 224 S.2d 693, 699 (Fla. 1969). Some open-meeting acts specifically require that a violation must have been willfully and knowingly committed before criminal sanctions may attach. See, e.g., ARK. STAT. ANN. § 12-2807 (1968); IOWA CODE § 28A.8 (1971); KY. REV. STAT. § 61.991 (Supp. 1974); PA. STAT. ANN. tit. 65, § 268 (1974 Purdon's Pa. Legis. Serv. 482); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 4 (Supp. 1974).

1421. See, e.g., MINN. STAT. ANN. § 471.705(2) (Supp. 1974); WASH. REV. CODE § 42.30.120 (1974); WIS. STAT. ANN. § 66.77(8) (1974 West's Wis. Legis. Serv. 333). A provision in the Tennessee act, TENN. CODE ANN. § 8-4406(a) (Supp. 1974), apparently gives the courts discretion to impose such a fine.

1422. Minnesota has a provision authorizing the removal from office of willful

2. Federal Open-Meeting Legislation

Although presently there is no comprehensive federal open-meeting act, both houses of Congress are considering such legislation.¹⁴²³ Until Congress acts, federal administrative agencies can continue to conduct a significant part of their activities in private.¹⁴²⁴

a. *The Federal Advisory Committee Act.* One statute that currently requires a limited number of federal agencies to hold open meetings is the Federal Advisory Committee Act (FACA).¹⁴²⁵ This act regulates agency advisory committee use of executive sessions. Specifically, it requires advisory committees to hold open meetings¹⁴²⁶ unless the substantive matters to be discussed fall within one of the exemptions to the FOIA.¹⁴²⁷

Although the FACA includes no express enforcement provisions, the results in two recent cases¹⁴²⁸ involving the applicability of the FOIA's exemption for inter- and intra-agency memoranda¹⁴²⁹ indicate that the courts are willing to treat this act as a functional extension of the FOIA.

In *Gates v. Schlesinger*,¹⁴³⁰ an Assistant Secretary of Defense had determined that "working sessions" of the Defense Advisory Committee on Women in the Services (DACOWITS) should be closed

violators after their third offense. See MINN. STAT. ANN. § 471.705(2) (Supp. 1974). No other state act contains a removal sanction.

1423. S. 5, 94th Cong., 1st Sess. (1975), was introduced on January 15, 1975. H.R. 5075, 94th Cong., 1st Sess. (1975), an identical version of the "Government in the Sunshine" bill, was introduced on March 18, 1975. Both are modified versions of S. 260, 93d Cong., 1st Sess. (1973), introduced on January 9, 1973. S. 260 was substantially modified following hearings held by the Subcommittee on Reorganization, Research, and International Organizations of the Senate Committee on Government Operations on May 21-22, 1974, resulting in Committee Print No. 3 of S. 260 (September 30, 1974) [hereinafter S. 260, Comm. Print No. 3]. See *Open-Meeting Hearings*, *supra* note 1309, at 1-185. The current version of the bill, which includes additional changes, is largely the result of further hearings held by the same subcommittee on October 15, 1974. See *id.* Although the current version will undoubtedly undergo further modification, its major provisions are likely to remain intact when and if it is voted on. Interview with George L. Patten, Legislative Assistant to Senator Chiles, in Washington, D.C., April 28, 1975.

The relative tardiness of Congress in dealing with open-meeting legislation is in stark contrast to its approach to the areas of "open-records" and "freedom of information" laws. In these areas Congress set an example that has subsequently been followed by many states. See text at note 1305 *supra*.

1424. See *Open-Meeting Hearings*, *supra* note 1309, at 51-52.

1425. 5 U.S.C. app. I (Supp. III 1973). For a discussion of the role of advisory committees and the legislative history of the FACA, see Perritt & Wilkinson, *supra* note 1312.

1426. 5 U.S.C. app. I, §§ 10(a)(1), (3) (Supp. III 1973).

1427. 5 U.S.C. app. I, § 10(d) (Supp. III 1973).

1428. *Gates v. Schlesinger*, 366 F. Supp. 797 (D.D.C. 1973); *Nader v. Dunlop*, 370 F. Supp. (D.D.C. 1973).

1429. For a discussion of this exemption see text at notes 648-99 *supra*.

1430. 366 F. Supp. 797 (D.D.C. 1973).

because they involved "the exchange of verbal information and proposals between the Directors of the women's military components which, if written, would fall within the [section 552(b)(5)] exemption" ¹⁴³¹ The court did not address the question whether there can ever be an exemption for such meetings equivalent to the "inter-agency" exemption ¹⁴³² because it found that since DACOWITS possessed "no substantial authority," it was not an "agency" and matters before it could not therefore be considered "inter-agency" affairs. ¹⁴³³ According to the court, both legislative intent and general public policy considerations supported this narrow interpretation of the exemption:

Congressional intent and the policy of the Federal Advisory Committee Act underlie the result thus reached. Congress was concerned with the proliferation of unknown and sometimes secret "interest groups" or "tools" employed to promote or endorse agency policies. Congress established openness to public scrutiny as the keystone of the Advisory Committee Act. Arguments that public participation and disclosure would inhibit debate and frank expression of views were heard and rejected by Congress. ¹⁴³⁴

In *Nader v. Dunlop*, ¹⁴³⁵ where plaintiffs challenged the exclusion of the public from meetings of advisory committees to the Cost of Living Council, the court recognized that there is an advisory committee analogue to the intra-agency exemption, but limited it to situations where there has been "a specific finding made by the [Council's director] that the meeting, or a portion thereof, is to discuss a document which is specifically exempt from public disclosure under . . . 5 U.S.C. § 552(b)." ¹⁴³⁶ In granting plaintiffs' motion for summary judgment and ordering that all future meetings be open to public access absent the requisite specific finding, the court apparently rejected any notion that there is a general "working session" exemption.

Although the FACA, unlike the FOIA, ¹⁴³⁷ contains no provision allocating the burden of proof to the agency claiming an exemption, the courts in both *Gates* and *Dunlop* took the view "that the underlying policy considerations are identical and that the burden of proof should be comparable." ¹⁴³⁸ In neither case were the general conclusory statements of the agencies deemed sufficient.

¹⁴³¹. 366 F. Supp. at 798.

¹⁴³². 5 U.S.C. § 552(b)(5) (1970).

¹⁴³³. 366 F. Supp. at 799.

¹⁴³⁴. 366 F. Supp. at 799-800 (footnote omitted).

¹⁴³⁵. 370 F. Supp. 177 (D.D.C. 1973).

¹⁴³⁶. 370 F. Supp. at 180.

¹⁴³⁷. See 5 U.S.C. § 552(a)(3) (1970).

¹⁴³⁸. 370 F. Supp. at 179; 366 F. Supp. at 800.

Notwithstanding these judicial attempts to apply the FACA broadly to further the policy of open government, the Act's limited scope makes further legislation in this area essential. The Act applies only to advisory committees; it defines "advisory committee" as

any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—

- (A) established by statute or reorganization plan, or
- (B) established or utilized by the President, or
- (C) established or utilized by one or more agencies [as defined in 5 U.S.C. § 551(1)]

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.¹⁴³⁹

In the recent case of *Nader v. Baroody*,¹⁴⁴⁰ the United States District Court for the District of Columbia found that this definition was intended to encompass only formally organized committees and not "casual, informal contacts by the President or his immediate staff with interested segments of the population . . ."¹⁴⁴¹ Thus, the court held that informal biweekly meetings between White House officials and private sector groups to discuss various public issues were not subject to the requirements of the FACA, despite the fact that these groups occasionally offered written recommendations to the President.¹⁴⁴² For the purposes of the FACA, it may well be necessary to distinguish between established advisory committees and chance gatherings so as not to impede the efficient functioning of government.¹⁴⁴³ However, by excluding informal but "planned" advisory meetings from the scope of the FACA, the *Baroody* court has unduly restricted the scope of the statute: Government agencies should not be able to avoid the mandate of openness by relying upon the recommendations of "unestablished" committees.

b. *The proposed federal open-meeting act.* The same policies

1439. 5 U.S.C. app. I, § 3(2) (Supp. III 1973).

1440. 44 U.S.L.W. 2031 (D.D.C. June 23, 1975).

1441. 44 U.S.L.W. at 2031.

1442. 44 U.S.L.W. at 2031.

1443. See text at notes 1324-61 *supra*. The *New York Times* recently reported that the Chairman of the Federal Election Commission objects to requiring casual conversations between commissioners to be open because "[t]his . . . might prevent the commission from carrying out its statutory duty of correcting possible campaign law violations by 'informal methods of conference, conciliation and persuasion.'" N.Y. Times, July 16, 1975, at 40, col. 3 (late city ed.).

that underlie the FOIA and the FACA have prompted Congress to consider enacting federal open-meeting legislation. Thus, S. 260,¹⁴⁴⁴ the 1973 version of the "Government in the Sunshine Act," was introduced in the spirit of "freedom of information," in an attempt "to assure the openness of our governmental process and to restore public confidence in those processes."¹⁴⁴⁵ S. 5¹⁴⁴⁶ and H.R. 5075,¹⁴⁴⁷ the 1975 versions,¹⁴⁴⁸ are consistent with these original objectives. Although the bills also contain provisions requiring congressional committee meetings to be open to the public¹⁴⁴⁹ and regulating ex parte communications with federal agencies,¹⁴⁵⁰ the remainder of this discussion will focus exclusively on section 201 and S. 5,¹⁴⁵¹ which limits the ability of federal agencies to conduct closed meetings.

Section 201 applies to "any agency, as defined in [5 U.S.C. § 551(1)], where the body comprising the agency consists of two or more members."¹⁴⁵² Thus, the bill itself does not describe which government bodies are within its scope, but instead relies upon the definition of "agency" in the APA.¹⁴⁵³ While the APA's definition appears to be broad, it is significant that Congress, in amending the FOIA, concluded that the definition was too restrictive to serve the purposes of the FOIA.¹⁴⁵⁴ Because the policies represented by S. 5 parallel those behind the FOIA, it would seem reasonable to expect Congress to broaden the definition of "agency" contained in the current version of S. 5.

1444. S. 260, 93d Cong., 1st Sess. § 1 (1973).

1445. SENATE COMM. ON GOVERNMENT OPERATIONS, 93D CONG., 1ST SESS., GOVERNMENT IN THE SUNSHINE viii (Comm. Print 1973).

1446. S. 5, 94th Cong., 1st Sess. (1975).

1447. H.R. 5075, 94th Cong., 1st Sess. (1975).

1448. For a brief discussion of the legislative history of the federal sunshine bills see note 1423 *supra*.

1449. See S. 5, 94th Cong., 1st Sess. tit. I (1975). Although such a provision is of vital importance in any comprehensive federal open-meeting law, an analysis of it is beyond the scope of this Project. It should be noted, however, that a number of states have enacted comparable requirements for committees of their legislatures. See, e.g., N.H. REV. STAT. ANN. § 91-A:1 (I) (Supp. 1973); N.M. STAT. ANN. § 5-6-24 (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(b) (Supp. 1974); VT. STAT. ANN. tit. 1, § 313(d) (Supp. 1974). These requirements have apparently proved to be workable and effective.

1450. See S. 5, 94th Cong., 1st Sess. § 202 (1975). This section deals with the problem of ex parte communications relating to "on-the-record agency proceedings." Although requiring the disclosure of all such ex parte communications is an important part of providing the public with a full picture of all the considerations that are involved in the decision-making process, cf. HAWAII REV. STAT. § 91-13 (1968), this topic is also beyond the scope of this Project.

1451. S. 5, 94th Cong., 1st Sess. § 201 (1975). H.R. 5075, 94th Cong., 1st Sess. § 4 (1975), is an identical provision and will not be discussed separately.

1452. S. 5, 94th Cong., 1st Sess. § 201 (1975).

1453. This definition is set out in the text at note 336 *supra*.

1454. See 5 U.S.C.A. § 552(e) (Supp. Feb. 1975); text at note 338 *supra*.

Section 201's exclusion of single-member agencies¹⁴⁵⁵ has been the focus of considerable criticism. The policies underlying the requirement of open meetings for multi-member agencies would seem to be equally applicable to single-member agencies. As one of the staunchest opponents of the proposed bill stated, in arguing *against* requiring open meetings for all agencies:

[S. 5] may also implicitly assume that multi-headed agencies are entirely different, and have entirely different functions from single-member agencies. This is simply not so [For example,] regulatory functions similar to those performed by the [SEC] are also performed by single-member agencies. National banks, for example, are regulated by the comptroller of the currency, who has much the same powers as any other regulatory agency.

The bill, however, would have no application to these single-member agencies notwithstanding the fact that their decisions will often be reached by much the same processes as those of the [SEC]¹⁴⁵⁶

Proponents of a blanket exclusion for single-member agencies argue that it is difficult to determine what constitutes a "meeting" of a single-member body, inasmuch as there can be no deliberations "among" members, and that inclusion would provoke political opposition from the single-member bodies.¹⁴⁵⁷ While it is admittedly more difficult to define a "meeting" where a single-member agency is involved, a blanket exclusion of all such agencies is a negation of one of the key purposes of open-meeting legislation: that the public should be able to observe the preliminary stages of the decision-making process. In apparent recognition of this purpose, the proposed act expressly includes "meetings to conduct hearings" within its definition of "meetings."¹⁴⁵⁸ Surely no greater burden would be imposed on single-member agencies than on multi-member agencies to permit the public to attend such hearings. As a matter of public policy, therefore, at least hearings conducted by single-member agencies should be exposed to public scrutiny.

1455. Because it incorporates the APA definition of agency, section 201 also appears to exclude a significant number of executive branch agencies, *see Open-Meeting Hearings*, *supra* note 1309, at 175 (testimony of R. Plessner, Center for the Study of Responsive Law); American Bar Association Standing Committee on Association Communications, Report to the House of Delegates 5 (Aug. 1974) [hereinafter A.B.A. Report], including some multi-member bodies established by the Executive Office of the President. *See Open-Meeting Hearings*, *supra* note 1309, at 53 (testimony of J. Gardner, Chairman, Common Cause). Adoption of the expanded FOIA definition of "agency" would allow the inclusion of the Executive Office agencies. *See* text at note 338 *supra*.

1456. *Open-Meeting Hearings*, *supra* note 1309, at 201-02 (testimony of R. Garrett, Chairman, SEC).

1457. *Id.* at 22 (remarks of Senator Chiles).

1458. S. 5, 94th Cong., 1st Sess. § 201(a) (1975).

In describing the types of gatherings that it covers, S. 5 goes beyond many state provisions by explicitly including the preliminary stages of discussion and consideration.¹⁴⁶⁰ Significantly, however, it limits application of the open-meeting requirements to meetings of an agency and any "subdivision . . . authorized to take action on behalf of [an] agency" where "official agency business is considered or discussed by at least the number of agency members [or subdivision members] required to take action on behalf of the agency."¹⁴⁶¹ This insertion of a "quorum-limit" clearly indicates that the bill is not intended to cover all informal discussions between or among members of an agency.¹⁴⁶² Apparently the drafters of S. 5 determined, as have a number of states,¹⁴⁶³ that the need for manageable standards outweighs the public interest in requiring all such discussions to be open.

The bill contains no express provision covering agency advisory groups. While the FACA may be thought to make such a provision unnecessary, that Act does not deal with advisory groups composed entirely of full-time employees or officials of the government.¹⁴⁶⁴ Thus, it seems that neither it nor S. 5 covers advisory groups composed of such employees or officials if any one of them is not a member of the parent agency. This exception to open-meeting requirements does not comport with the underlying policies of either act and should be remedied.

Aside from these general scope provisions, section 201 also contains exemptions, enforcement procedures (including a description of the effect to be given actions taken in violation of S. 5), and sanctions. Recognizing the importance of carefully delineating issues that should be considered privately, the proposed act contains exemptions for matters concerning national defense and foreign policy,¹⁴⁶⁵ individual agency personnel and internal agency management,¹⁴⁶⁶ un-

1459. Compare S. 5, 94th Cong., 1st Sess. § 201(a) (1975), with statutes cited in notes 1339-41 *supra*.

1460. S. 5, 94th Cong., 1st Sess. § 201(a) (1975).

1461. The definition of "meeting" was added to the proposed bill after concern was voiced that courts would interpret "meetings" too expansively if the congressional language did not clearly indicate the type of gatherings covered by the bill. See *Open-Meeting Hearings*, *supra* note 1309, at 190 (testimony of G. Stafford, Chairman, Interstate Commerce Commission). The drafters of the original bill had been willing to leave to the courts the task of establishing meaningful standards for the statute's application. See *id.* at 236 (remarks of Senator Chiles).

1462. See text at note 1347 *supra*.

1463. 5 U.S.C. app. I, § 3(2)(iii) (Supp. III 1973).

1464. S. 5, 94th Cong., 1st Sess. § 201(b)(1) (1975), authorizes the closing of any meeting that "will disclose matters necessary to be kept secret in the interests of national defense or the necessarily confidential conduct of the foreign policy of the United States"

1465. The bill provides that any agency may close a meeting that "will relate solely to individual agency personnel or to internal agency office management and administration or financial auditing" S. 5, 94th Cong., 1st Sess. § 201(b)(2) (1975).

warranted invasions of individual privacy,¹⁴⁶⁶ law enforcement,¹⁴⁶⁷ trade secrets or commercial information,¹⁴⁶⁸ and the conduct or disposition of agency adjudications.¹⁴⁶⁹ These exemptions closely parallel the exemptions included in most state acts¹⁴⁷⁰ and in the FOIA.¹⁴⁷¹ The drafters apparently intended to restrict the scope of these exemptions while maintaining consistency with the FOIA.¹⁴⁷²

1466. S. 5, 94th Cong., 1st Sess. § 201(b)(3) (1975), authorizes an agency to close, by majority vote, any meeting or portion thereof that will tend to charge with crime or misconduct, or to disgrace any person, or will represent a clearly unwarranted invasion of the privacy of any individual: *Provided*, That this paragraph shall not apply to any Government officer or employee with respect to his official duties or employment: *And provided further*, That as applied to a witness at a meeting this paragraph shall not apply unless the witness requests in writing that the meeting be closed to the public

1467. S. 5, 94th Cong., 1st Sess. § 201(b)(4) (1975), permits the closing of a meeting or portion of meeting that

will disclose information pertaining to any investigation conducted for law enforcement purposes, but only to the extent that the disclosure would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (D) disclose investigative techniques and procedures, (E) endanger the life or physical safety of law enforcement personnel, or (F) in the case of an agency authorized to regulate the issuance or trading of securities, disclose information concerning such securities, or the markets in which they are traded, when such information must be kept confidential in order to avoid premature speculation in the trading of such securities

Major changes in this exemption resulted from the recent amendments to exemption seven of the FOIA, *see* 5 U.S.C.A. § 552(b)(7) (Supp. Feb. 1975), *amending* 5 U.S.C. § 552(b)(7) (1970); the drafters wanted to keep the two acts consistent. *See* note 1472 *infra*. Subsection (F) of this rewritten exemption seems to have resulted primarily from the strong opposition on the part of the SEC. *See Open-Meeting Hearings, supra* note 1309, at 203-04 (testimony of R. Garrett, Chairman, SEC).

1468. S. 5, 94th Cong., 1st Sess. § 201(b)(5) allows agencies to close meetings that will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person where

(A) a Federal statute requires the information to be kept confidential by Government officers and employees; or

(B) the information has been obtained by the Federal Government on a confidential basis other than through an application by such person for a specific Government financial or other benefit and the information must be kept secret in order to prevent grave and irreparable injury to the competitive position of such person

1469. The bill allows any agency to close a meeting that "will relate to the conduct or disposition (but not the initiation) of a case of adjudication governed by the first paragraph of section 554(a) of title 5, United States Code, or of subsection (1), (2), (4), (5), or (6) thereof." S. 5, 94th Cong., 1st Sess. § 201(b)(6) (1975).

1470. *See* text at notes 1258-63 *supra*.

1471. *See* text at notes 506-846 *supra*. The bill's exemption for agency personnel matters, § 201(b)(2), however, has no analogue in the federal FOIA.

1472. We looked at [the FOIA exemptions] to start with and if you have noticed, we have interwoven ours with those exemptions feeling that should some one raise one of those areas we would say, wait a minute now; that was one of the exceptions set in the Freedom of Information Act. So basically, we have tried to kind of weave through that pattern. If anything, I think we have tried to tighten our exemptions and not make them as broad. If there is a way in which we can tighten more, we would like to do that, too, at the same time keeping in mind that we have the practical job of trying to pass a piece of legislation if we

In general, there is little to criticize about these exemptions. A few points, however, warrant discussion. First, presumably because it is very difficult for Congress to predetermine that in *all* cases within a given category the public interest will be best served by allowing closed sessions,¹⁴⁷³ most of the exemptions contain language that limits the circumstances in which they may be invoked. Thus, exemption one limits the national security exemption to matters "necessary" to be kept secret and the foreign policy exemption to the "necessarily confidential" conduct of United States foreign policy. Similarly, exemption three limits the general privacy exemption to "clearly unwarranted" invasions of individual privacy. Exemption four limits the law enforcement exemption by enumerating the specific independent interests Congress intended to protect. Finally, exemption five contains language restricting the trade secret exemption to cases where disclosure would cause "grave" and "irreparable" injury. Such limitations are important: They provide reviewing courts with a standard (albeit imprecise) by which to determine the scope of a particular exemption.¹⁴⁷⁴ Exemptions two (agency personnel matters) and six (agency adjudications) do not contain limiting language. Thus, any matter within the scope of these exemptions could be considered in closed session, notwithstanding special circumstances favoring its discussion in public. While the absence of a limitation in exemption six appears justifiable—especially since information regarding the initiation of agency adjudications is not exempt—the absence of any limitation in exemption two is troublesome. The public might have a substantial interest, at least in certain cases, in matters involving the internal management of government bodies.

Second, a further modification of the exemptions should be considered. The exemptions involving personal privacy,¹⁴⁷⁵ including individual agency personnel matters, should be amended to prohibit closed sessions when the individual involved requests that the proceedings be open. The public interest in protecting the privacy of the individual disappears when the individual waives the exemp-

can and trying to anticipate wherein we will get the most heat or where we will have the most difficult time moving the legislation thing along. *Open-Meeting Hearings*, *supra* note 1309, at 22-23 (remarks of Senator Chiles). See also A.B.A. Report, *supra* note 1455, at 506. Probably the most significant change from the FOIA exemptions is the omission of any parallel to the inter-agency and intra-agency memoranda exemption in the proposed bill. A number of agencies have argued that such an exemption should be added to the bill. See, e.g., *Open-Meeting Hearings*, *supra* note 1309, at 205 (testimony of R. Garrett, Chairman, SEC). See generally text at notes 1428-36 *supra*.

1473. Cf. text at notes 1231-35 *supra*.

1474. This is especially important because the clause providing for de novo review by the courts was eliminated from the most recent draft. See note 1482 *infra*.

1475. S. 5, 94th Cong., 1st Sess. §§ 201(b)(2), (3) (1975).

tion's protection.¹⁴⁷⁶ A number of state acts include this limitation.¹⁴⁷⁷ In fact, S. 5 itself contains a similar limitation in exemption three, but restricts it to witnesses only. There is no sound basis for distinguishing between witnesses and other persons whose privacy may be invaded but who nevertheless seek to have the agency proceedings open to the public.¹⁴⁷⁸

Sections 201(g) and (h) of S. 5 contain the essential elements of an adequate enforcement procedure. The bill grants standing to "any citizen or person resident in the United States" to enforce the act's requirements in an "action . . . against an agency and its members."¹⁴⁷⁹ The courts are given jurisdiction to enforce the act "by declaratory judgment, injunctive relief, or otherwise."¹⁴⁸⁰ The jurisdiction provision seems sufficiently broad to enable the courts to fashion appropriate relief in cases where an agency is either violating or threatening to violate the act. Moreover, the bill provides that "[t]he burden is on the agency to sustain its action";¹⁴⁸¹ it thus reinforces the general presumption of openness and makes it clear that to survive a challenge, the agency must demonstrate the applicability of one of the statutory exemptions.¹⁴⁸²

Section 201(h) allows the court to apportion costs among the parties: "[T]he *reasonable* costs of litigation (including reasonable fees for attorneys and expert witnesses) may be apportioned to the original parties or their successors in interest whenever the court determines such award is appropriate. In the case of costs against an agency or its members, the costs may be assessed by the court against the United States."¹⁴⁸³ This provision is preferable to the analogous state provisions:¹⁴⁸⁴ The court has complete discretion in awarding costs and is not limited to cases in which the plaintiff has substantially prevailed. This provision should both encourage private citizens to contest legitimate violations of the act—the closing of agency sessions—and serve to deter frivolous actions.

S. 5 also provides for expeditious hearings: "[A] defendant shall serve his answer within twenty days after the service of the com-

1476. See Comment, 8 U. RICH. L. REV. 261, *supra* note 1306, at 267.

1477. See note 1381 *supra*.

1478. The hearings are silent on the reasons for the distinction.

1479. S. 5, 94th Cong., 1st Sess. § 201(g) (1975).

1480. S. 5, 94th Cong., 1st Sess. § 201(g) (1975).

1481. S. 5, 94th Cong., 1st Sess. § 201(g) (1975).

1482. Unlike the FOIA, 5 U.S.C.A. § 552(a)(4)(B) (Supp. Feb. 1975) (see text at notes 962-64 *supra*), S. 5 does not contain a provision calling for the de novo review of agency actions. An earlier version of the bill contained such a provision. See S. 260, Comm. Print No. 3, *supra* note 1423, § 201(h). The elimination of the provision was presumably a concession to the agencies, although no particularly severe criticism of this provision appears in the hearings.

1483. S. 5, 94th Cong., 1st Sess. § 201(h) (1975).

1484. See note 1387 *supra*.

plaint. . . . Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned a hearing and trial at the earliest practicable date and expedited in every way."¹⁴⁸⁵ This provision seems adequate in all respects.

Mention should be made of one enforcement provision contained in prior drafts but not included in the proposed bill. This provision required that an agency obtain a written determination from the Assistant Attorney General Office of Legal Counsel "in advance of the closing of [a] meeting . . . that the designation of such meeting is authorized"¹⁴⁸⁶ This provision parallels a section of the Texas open-records law,¹⁴⁸⁷ but has no counterpart in state open-meeting acts. Unfortunately, it was deleted following considerable criticism by a number of agencies.¹⁴⁸⁸ Although it would have placed increased burdens upon both the agencies and the Department of Justice, this provision would have greatly reduced the overall costs of enforcement by discouraging frivolous assertions of exemptions and thereby reducing the need for citizen enforcement. The agencies objected primarily to the fact that a "pre-screening" requirement would have prohibited them from convening sessions on short notice and to the current inability of the Justice Department to review such claims.¹⁴⁸⁹ None of these problems is insurmountable. This provision could be a most effective enforcement device and should receive further serious consideration before it is eliminated from the proposed act.

Once an enforcement action is brought, the bill permits courts, "having due regard for orderly administration and the public interest, [to] set aside any agency action taken or discussed at an agency meeting improperly closed to the public."¹⁴⁹⁰ This provision, while similar to those of a number of state acts,¹⁴⁹¹ is significant in three respects. First, instead of requiring that all actions taken at meetings in violation of the act be invalidated, it gives the courts discretion to consider all relevant factors. Second, it attempts to establish some standard, however vague, to guide the courts in the exercise of their discretion. Third, it specifically applies not only to

1485. S. 5, 94th Cong., 1st Sess. § 201(g) (1975).

1486. S. 260, Comm. Print No. 3, *supra* note 1423, § 201(c) (1975).

1487. See TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7 (Supp. 1974), discussed in the text at notes 1281-85 *supra*.

1488. See, e.g., *Open-Meeting Hearings*, *supra* note 1309, at 245-46 (testimony of R. Berg, Executive Secretary, Administrative Conference). See also *id.* at 218-19 (testimony of H. Geller).

1489. *Id.* at 245 (testimony of R. Berg, Executive Secretary, Administrative Conference).

1490. S. 5, 94th Cong., 1st Sess. § 201(g) (1975).

1491. See text at notes 1406-07 *supra*.

actions taken at meetings in violation of the act, but also to official actions resulting from discussions at improperly closed meetings. Thus, this provision may be a more effective deterrent than many of its state counterparts.

S. 5 also requires that suits challenging closed meetings be brought within sixty days after the meeting or, "if public notice of such meeting was not provided by the agency in accordance with the requirements of this section," within sixty days after public announcement of the meeting.¹⁴⁹² This provision was apparently included to mitigate the uncertainty that an invalidation provision might cause¹⁴⁹³ by limiting the period during which persons may challenge agency actions. This limitation does not seem unreasonable and should be retained.

Unlike most of the state acts,¹⁴⁹⁴ S. 5 contains no criminal sanctions against individual officials who violate the act. In fact, it contains no individual sanctions. An earlier draft of the bill contained a provision that allowed the courts to assess a civil fine of between \$100 and \$1000 against agency members, payable to the United States, if the courts found such members guilty of a willful violation of the requirements of the act.¹⁴⁹⁵ It is unclear why this provision, which may be a fairly effective deterrent, was eliminated.¹⁴⁹⁶

It would seem that some type of individual sanction against willful violators should be included in the act. The inclusion of a provision for removing willful violators from office was urged during the hearings on the proposed bill¹⁴⁹⁷ and should be seriously considered. The recent amendments to the FOIA added a similar provision.¹⁴⁹⁸ Any federal open-meeting law should contain one.

II. INCREASING PROTECTION OF CITIZEN PRIVACY

A. Introduction

The subcommittee, under your able direction, has been conducting hearings for over a year now on failures by the Federal Government to make information available to the public. You are to be commended for your efforts because, surely, there is no single attribute more fundamental to a democratic society than the free flow of information. Liberty and freedom are dependent upon the truth.

There is another side of this issue, however, which deserves

1492. S. 5, 94th Cong., 1st Sess. § 201(g) (1975).

1493. See text at notes 1394-95 *supra*.

1494. See text at note 1418 *supra*.

1495. S. 260, Comm. Print No. 3, *supra* note 1445, § 201(i).

1496. For criticism of the provision see *Open-Meeting Hearings*, *supra* note 1309, at 219 (testimony of H. Geller).

1497. See *id.* at 202 (testimony of D. Wickham).

1498. See 5 U.S.C.A. § 552(a)(4)(F) (Supp. Feb. 1975), discussed in the text at notes 1072-97 *supra*.

equal respect and examination—the right of individuals to maintain personal privacy. . . . [I]nvasion of the sanctity of a person's privacy will be as destructive of a society's freedom and liberty as will the foreclosure of information about the acts of government in such a society.¹⁴⁹⁹

When President Johnson signed the Federal Public Records Act into law, he expressed pride in "an open society in which the people's right to know is cherished and guarded."¹⁵⁰⁰ The federal and state governments have figured prominently in the controversy over the "right to know," as government operations have become increasingly numerous, complex, and removed from public scrutiny. Governmental growth, with its attendant increase in information needs, has also given rise to crusaders for the necessary complement of the right to know—the right of privacy.

The long-standing tension between governmental information needs and the desire of individuals to withhold personal, identifying details about their lives has heightened in the past several decades as a result of the interplay of three developments. First, these years have witnessed a geometric growth in government regulation and services that have increased government-citizen contacts. Second, acceptance of the behavioral-predictive theory of information—the theory that behavior patterns can be predicted if enough relevant data is gathered and properly analyzed¹⁵⁰¹—has led to demands for increasing amounts of information in ever widening areas.¹⁵⁰² Third, rapid advances in computer science have eliminated the traditional hindrances to government acquisition of data¹⁵⁰³ by increasing the ease of information acquisition, lessening the need to limit data retention,¹⁵⁰⁴ and increasing intragovernmental transfer of informa-

1499. *Sale or Distribution of Mailing Lists by Federal Agencies, Hearings on H.R. 8903 and Related Bills Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess. 77 (1972) (statement of Representative Goldwater) [hereinafter *Hearings on Mailing Lists*].

1500. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 309, at 11 (statement of President Johnson).

1501. See A. WESTIN, *PRIVACY AND FREEDOM* 135-57 (1967).

1502. See Ervin, *Privacy and Government Investigations*, 1971 U. ILL. L.F. 137, 138. See also NATIONAL ACADEMY OF SCIENCES, *DATABANKS IN A FREE SOCIETY* xvii (A. Westin & M. Baker eds. 1972) [hereinafter *DATABANKS*]; House Republican Research Committee, Task Force on Privacy, *Recommendations*, Aug. 21, 1974, at 1.

1503. For a full discussion of the impact of computers see A. MILLER, *ASSAULT ON PRIVACY* 1-53, 322 (1971).

1504. See *Federal Data Banks, Computers and the Bill of Rights, Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 943 (1971) [hereinafter *Hearings on Data Banks*] (statement of C. Lister); *DATABANKS*, *supra* note 1502, at 320 ("The National Academy of Sciences reported in 1972 that it is now technologically possible to build a computerized on-line file containing the compacted equivalent of 20 pages of typed information about the personal history and selected activities of every person in the United States").

Data that might once have been discarded are now more likely to be kept, in an

tion.¹⁵⁰⁵ As Professor Miller has pointed out: "In accordance with a principle akin to Parkinson's Law, as capacity for information-handling increases there is a tendency to engage in more extensive manipulation and analysis of data . . . pertaining to a larger number of variables."¹⁵⁰⁶ Together, these three phenomena have created a spiraling demand for information and have left us threatened with the emergence of a "dossier society."

1. *The Extent of Government-Held Information*

Government data acquisition statistics make clear that not only political activists and government employees are threatened by the accumulation of information by the government. Increasingly, access to government benefits and services requires a willingness on the part of individuals to divulge private information.¹⁵⁰⁷ Moreover, an observable trait of government agencies is that when a problem is confronted, the tendency is to react with a demand for more data,¹⁵⁰⁸ as evidenced by the 1970 census¹⁵⁰⁹ and the rising number of government questionnaires.¹⁵¹⁰

In 1966, in the midst of debate over the proposed National Data Center, a Senate Judiciary subcommittee initiated a survey to determine "the amount, nature, and use of information which Government agencies currently maintain on individuals."¹⁵¹¹ The survey revealed that federal files contained more than 3 billion records on individual citizens,¹⁵¹² nearly one half of which were retrievable by computer, including over 27.2 billion names, 2.3 billion present and past addresses, 264 million criminal histories, 280 million mental

expectation that a purpose may ultimately be found for them. In fact, it has been suggested that the ability of a computer to store large quantities of data compels the owner to increase data acquisition in order to reduce the cost per unit of data. See Report of Secretary's Advisory Committee on Automated Personal Data Systems, HEW, Records, Computers and the Rights of Citizens 13 (1973) [hereinafter HEW Report]. Computerization also permits more complete use of the information gathered, and facilitates the tasks of retrieving and disseminating: Data may be more imaginatively collated and collections may be searched for relatively low priority purposes. *Hearings on Data Banks*, *supra*, at 943.

1505. See A. WESTIN, *supra* note 1501, at 161-62; A. MILLER, *supra* note 1503, at 24-54. But see DATABANKS, *supra* note 1502, at 253, 255.

1506. Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information Oriented Society*, 67 MICH. L. REV. 1089, 1103 (1969).

1507. Miller, *supra* note 1506, at 1103.

1508. *Hearings on Data Banks*, *supra* note 1504, at 942-43 (statement of C. Lister).

1509. See *Privacy, the Census and Federal Questionnaires*, *Hearings on S. 1791 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 460-95 (1969) [hereinafter *Hearings on the Census*].

1510. See, e.g., *Hearings on the Census*, *supra* note 1509, at 37-53, 867-926.

1511. STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 90TH CONG., 2D SESS., GOVERNMENT DOSSIER 1 (Comm. Print 1967) [hereinafter GOVERNMENT DOSSIER].

1512. See *id.* at 9.

health records, 916 million profiles on alcoholism and drug addiction, and over 1.2 billion financial records.¹⁵¹³ More significantly, the report concluded that much of the information retained was irrelevant to agency needs and that in many instances confidentiality provisions were nonexistent or not meaningful.¹⁵¹⁴ A 1974 survey by a different subcommittee, which supplemented and updated these findings, pointed out that 86 per cent of the government data banks are computerized, and that few of the data banks had any explicit statutory authorization for their retention of files.¹⁵¹⁵ Computerization, however, cannot itself account for the abundance of government-held data concerning individual citizens: According to at least one study, for most organizations computerization has not brought an increase in scope of the content of records maintained on each individual.¹⁵¹⁶

It has been estimated that the average American is the subject of ten to twenty personal files or dossiers compiled by either government units or private organizations.¹⁵¹⁷ The threat to individual privacy is thus no longer a potential—it is a reality.¹⁵¹⁸ As Senator Mathias aptly described the situation, "If knowledge is power, this encyclopedic knowledge gives Government the raw materials of tyranny."¹⁵¹⁹

2. *A Definition of Privacy*

The counterweight to this growing governmental power is the developing concern over privacy. A definition of privacy that will provide a conceptually sound basis for the development of rules con-

1513. *Hearings on Data Banks*, *supra* note 1504, at 574.

1514. GOVERNMENT DOSSIER, *supra* note 1511, at 8. Further, as Representative Horton pointed out: "Even if . . . the most sensitive and personal information is shielded in confidence . . . large additional reservoirs of data on individual citizens are not only not secure but actually available for public disclosure for purposes of commercial or other types of solicitation." *Hearings on Mailing Lists*, *supra* note 1499, at 63.

1515. See STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FEDERAL DATA BANKS AND CONSTITUTIONAL RIGHTS: SUMMARY AND CONCLUSIONS 10-11, 26-29 33-35 (Comm. Print 1974) [hereinafter SUMMARY AND CONCLUSIONS]. Besides tabulating the amount of information held by agencies, the study of this committee, in six volumes, analyzes the information-gathering practices of all government agencies with respect to statutory authority, subject notification, subject review, access by other agencies, public access, security precautions, and sources of information. See STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FEDERAL DATA BANKS AND CONSTITUTIONAL RIGHTS (Comm. Print 1974) [hereinafter FEDERAL DATA BANKS].

1516. See DATABANKS, *supra* note 1502, at 244.

1517. See *Records Maintained by Government Agencies*, *Hearings on H.R. 9527 and Related Bills Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess. 22 (1972) (statement of Representative Patten) [hereinafter *Hearings on Records*].

1518. *Hearings on Mailing Lists*, *supra* note 1499, at 63 (statement of Representative Horton).

1519. *Hearings on Data Banks*, *supra* note 1504, at 574.

cerning information practices is difficult to formulate because the significance of privacy protection varies for each individual and with each individual circumstance.¹⁵²⁰ Further, privacy collides with other social values that have proved equally difficult to define, such as freedom of the press and freedom of information.¹⁵²¹ Nevertheless, to determine the degree to which government must respect privacy, it is necessary to establish a working definition.¹⁵²²

Since Warren and Brandeis seized upon Judge Cooley's definition of privacy as the "right to be let alone,"¹⁵²³ numerous persons have attempted to sophisticate a privacy doctrine.¹⁵²⁴ Clearly, privacy interests of the individual are many and varied. At issue in this discussion are privacy interests relating to government information-handling and the individual's desire to maintain anonymity with regard to personal, identifying details. A useful definition, therefore, is one in which a number of writers have concurred: the right of privacy is the right to control the flow of information concerning the details of one's individuality—one's physical and individual characteristics, knowledge, capabilities, beliefs, and opinions.¹⁵²⁵ In specifying the areas protected by the privacy right, however, legislatures and courts have invariably turned to a right of privacy based on the content of the information: only certain categories of information—information regarding the family or individual sexuality, for example—are protected.¹⁵²⁶ But the underlying privacy concept, which is tied to the individual and his personality, has a considerably

1520. HEW Report, *supra* note 1504, at 38.

1521. *Id.*

1522. Pipe, *Privacy: Establishing Restrictions on Government Inquiry*, 18 AM. U. L. REV. 516, 518 (1969).

1523. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, at 193 (1890).

1524. See, e.g., A. MILLER, *supra* note 1503, at 210-38; A. WESTIN, *supra* note 1501, at 31-51, 330-99; Fried, *Privacy*, 77 YALE L.J. 175, 182 (1968); Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974).

1525. See A. MILLER, *supra* note 1503, at 25 ("[P]rivacy is the individual's right to control the circulation of information relating to him . . ."); Fried, *supra* note 1524, at 483 ("Privacy, thus, is control over knowledge about oneself"); Comment, *Maintenance and Dissemination of Criminal Records: A Legislative Proposal*, 19 UCLA L. REV. 654, at 654 n.2 (1972) ("The right of privacy is the right of the individual to decide for himself how much he will share with others his thoughts, his feelings, and the facts of his personal life"). Cf. Justice Douglas' definition of privacy as having a "dual aspect: [E]very individual needs both to communicate with others and to keep his thoughts and beliefs from others. This means that a person should have the freedom to select for himself the time and circumstances when he will share his thoughts and attitudes with others and to determine the extent to which that sharing will go." Douglas, *Foreword to Project, The Computerization of Government Files: What Impact on the Individual?*, 15 UCLA L. REV. 1374, 1375 (1968). A broad view of privacy would also require that a person who discloses information to another be able to control the latter's disposition of that information.

1526. See 5 U.S.C. § 552(b)(6) (1970), discussed in the text at notes 700-44 *supra*; text at notes 1562-788 & 1897-902 *infra*.

broader reach and thus has a significant potential for development and expansion, as the Privacy Act of 1974 illustrates.¹⁵²⁷

3. *Government Invasions of Privacy: Methods and Results*

There are three major stages in any information-handling system: acquisition, retention, and dissemination. Government information practices may threaten the individual's control over the flow of information about himself at any of these stages; thus, four questions are raised: What information may be collected; under what circumstances may it be retained; to whom may the data be made available; and what remedies or sanctions are available to secure effective protection for privacy.

The question of acquisition is the most crucial because all other problems come into play only after information is obtained. Government agencies "tend to defend needs for information with a pledge of confidentiality of personal reports once secured, omitting the fact that intrusions on a person's privacy begin at the taking of sensitive personal facts."¹⁵²⁸ Problems of acquisition have provoked considerable discussion. For example, certain questions asked of applicants for federal jobs have been challenged,¹⁵²⁹ and several questions were removed from the proposed 1970 census after an outcry from persons protesting the sensitivity of the questions.¹⁵³⁰ Even if the collection of certain information would not violate individual privacy rights, the methods employed to collect it, such as wiretapping and electronic surveillance,¹⁵³¹ may constitute such a violation.

Retention and dissemination of acquired information pose equally grave threats. The retention of certain criminal justice¹⁵³² and welfare data¹⁵³³ has become a prominent concern; in fact, the controversy that first focused attention on the right of privacy—the National Data Bank proposal—involved the place of retention.¹⁵³⁴ A problem that arises in the area of dissemination is that one agency that may legitimately collect and retain certain information on an individual, may, without the individual's consent, give the informa-

1527. See text at notes 1966-2214 *infra*.

1528. *Hearings on the Census*, *supra* note 1509, at 130 (Representative Betts). See *id.* at 270-82 (testimony of L. Speiser, ACLU).

1529. See text at notes 2031-43 *infra*.

1530. See text at notes 1990-93 *infra*.

1531. See text at notes 1844-48 *infra*; *Hearings on Military Surveillance Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974) [hereinafter *Hearings on Military Surveillance*].

1532. See, e.g., *Tarleton v. Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974).

1533. See text at notes 1709-18 *infra*.

1534. See FEDERAL DATA BANKS, *supra* note 1515; notes 2102-04 *infra* and accompanying text.

tion to an agency that could not have legitimately collected it. The 1974 Senate survey of agency practices found this danger quite real: "Once information about an individual is collected by a Federal agency, it is likely that that information will be fairly readily passed on to other Federal, State and local agencies."¹⁵³⁵ Finally, privacy interests are often further infringed when an individual whose privacy has been invaded is denied a remedy.

The harms from unregulated government information-handling can be divided into three categories: psychological problems created by acquisition of data, loss of individual benefits due to misuse of the data, and invasion of privacy per se. Any attempt to appraise the impact on individuals of data acquisition must consider the potential psychological harms. First, there is the very real possibility that individuals will, with increasing frequency, base their decisions regarding activities and expressions on how they will enhance their record.¹⁵³⁶ A concern for a clean record, reinforced by the popular conception of the computer as unforgetting,¹⁵³⁷ could threaten to create "a society in which unorthodoxy is discouraged by its notoriety, and even the mildest eccentricities are catalogued for official evaluation."¹⁵³⁸ This "chilling effect" on unpopular expressions and beliefs exemplifies the theory of "aversive control" avoidance-learning—that as an individual learns to avoid activities that he feels are disapproved, he will stop not only the disapproved activities, but similar or related activities as well.¹⁵³⁹ In the extreme, individuals may begin to doubt whether they exist apart from their record.¹⁵⁴⁰

A 1952 study evaluating the impact of governmental loyalty and security inquiries found many resulting behavioral changes: severance of membership in organizations on the Attorney General's list and cancellation of subscriptions to literature sent by these organizations; refusal to sign petitions without proof of a bona fide sponsorship; refusal to join an organization not on the Attorney General's list for fear it might later develop in a radical direction; and cautiousness in political conversations with strangers.¹⁵⁴¹ Moreover, it

1535. SUMMARY AND CONCLUSIONS, *supra* note 1515, at 37.

1536. A. MILLER, *supra* note 1503, at 50.

1537. This has been described as an "information prison" in which a person's past places inescapable limits on his future. See *Hearings on Data Banks*, *supra* note 1504, at 943 (testimony of C. Lister, ACLU).

1538. *Id.*

1539. See A. BANDURA, *PRINCIPLES OF BEHAVIOR MODIFICATION* 293-354 (1969).

1540. A. MILLER, *supra* note 1503, at 49.

1541. See Johoda & Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs*, 61 *YALE L.J.* 295, 307-08 (1952). For a detailed treatment of the chilling effect of surveillance on legitimate political activity see Askin, *Surveillance: The Social Science Perspective*, in

has been observed that surveillance of a particular individual need not actually be going on to produce the effect in that individual as long as there is public knowledge that surveillance has occurred and is continuing to occur.¹⁵⁴² This is especially relevant because of recent surveys revealing widespread public concern over the threat to privacy from computers.¹⁵⁴³ Privacy is necessary for proper psychological development,¹⁵⁴⁴ for health,¹⁵⁴⁵ and for the growth of democratic societies.¹⁵⁴⁶ Yet, as Richard L. Tobin commented in a 1968 editorial entitled "1984 Minus Sixteen and Counting," "[w]e cannot assume . . . that privacy will survive simply because man has a psychological or social need for it."¹⁵⁴⁷

Even certain decisions of federally elected officials seem "chilled" by various surveillance and information-keeping techniques. The *New York Times* stated on February 25, 1974:

The source recalled one Senator who had been told of an investigation concerning his daughter, a college student who had "gotten involved in demonstrations and free love," and a Republican Representative who had been told that the [FBI] possessed evidence indicating that he was a homosexual.

"We had him in our pocket after that," the source said of the Representative. He added that he could not recall the Senator, a liberal Democrat, ever criticizing the FBI in public.¹⁵⁴⁸

But, as Representative Mikva, himself the subject of an Army intelligence file pointed out:

The objection to this program is not that a U.S. Senator may have

SURVEILLANCE, DATAVEILLANCE AND PERSONAL FREEDOMS 72-86 (COLUM. HUMAN RIGHTS L. REV. ed. 1973).

1542. See Askin, *supra* note 1541, at 82.

1543. For example, a national survey conducted in 1971 found that 53 per cent of the sample believed that computerized information files might be used to destroy individual freedoms, and 58 per cent felt that computers will be used in the future to keep people under surveillance. In addition 38 per cent believed that computers represent a real threat to personal privacy, 91 per cent of those questioned felt that computers were used to compile information files on U.S. citizens, and 54 per cent believed these files were maintained for surveillance of activist or radical groups. Finally, 62 per cent expressed their concern over the types of information being kept, and 45 per cent said political activity records should not be kept. *Id.* at 88.

1544. Cf. Handler & Hollingsworth, *Stigma, Privacy, and Other Attitudes of Welfare Recipients*, 22 STAN. L. REV. 1, 2 (1969).

1545. Jourard, *Some Psychological Aspects of Privacy*, 31 LAW & CONTEMP. PROB. 307, 318 (1966).

1546. A. WESTIN, *supra* note 1501, at 34.

1547. Tobin, *1984 Minus Sixteen and Counting*, SATURDAY REV., April 13, 1968, at 77-78.

1548. Crewdson, *Files from Hoover to Backers Reported*, N.Y. Times, Feb. 25, 1974, at 52, col. 1 (late city ed.), *quoted in* 120 CONG. REC. H2440 (daily ed. April 2, 1974). See *Hearings on Data Banks*, *supra* note 1504, at 137 (statement of Representative Mikva).

been subjected to surveillance, or that a special file was or was not kept on him

The harm comes rather when the ordinary citizen feels he cannot engage in political activity without becoming a "person of interest," without having his name and photo placed in a file colloquially, if not officially, labeled "subversive."¹⁵⁴⁹

Invasions of privacy also result in direct injury to the individual through misuse of his records, for once an individual divulges personal information, he in most instances loses all effective control over it.¹⁵⁵⁰ Harm can result if information that is accurate from one perspective is used in a different context in which it is misleading. Harm can also result from incomplete or erroneous information collections. These possibilities are aggravated because in many situations individuals have only limited rights to see, supplement, or correct their records.¹⁵⁵¹

Damages flowing from the use of incomplete information are clear: In 1973, Massachusetts Governor Sargent gave a full pardon to a former felon who had kept his record clean for 10 years. The individual moved to a community 1000 miles away and enrolled in a community college. The college president, after running a routine police check with the state's new computer file, learned of his conviction and expelled him. The computer record had not included the full pardon.¹⁵⁵² Another case was related by Representative Moss:

A young couple were returning home to San Francisco one evening a year ago when they were stopped by Santa Clara County Sheriff's deputies, eventually handcuffed, held at gunpoint and locked up overnight on charges of auto theft. The arresting officers had queried the San Francisco city and county criminal justice data bank and learned that the couple's Falcon had been reported stolen a year earlier. Police had failed to enter into the computer the "pink slip" record that the car had been recovered by its rightful owners.¹⁵⁵³

There are countless similar examples of individuals being denied employment, promotion, or some other benefit because of records of prior arrests.¹⁵⁵⁴ That charges were dropped or dismissed, or that

1549. *Hearings on Data Banks*, *supra* note 1504, at 89.

1550. *Criminal Justice Data Banks*, *Hearings on S. 2542, S. 2810, S. 2963, S. 2964 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 18 (1974) (statement of Senator Ervin) [hereinafter *Hearings on Criminal Justice Data Banks*].

1551. *See, e.g.*, text at notes 1678-93 *infra*. The new federal Privacy Act takes steps to provide rights of access and challenge for records held by the federal government. *See* text at notes 2084-98 *infra*.

1552. 120 CONG. REC. H2459 (daily ed. April 2, 1974) (remarks of Representative Heinz).

1553. *Id.* at H2456.

1554. *See Hearings on Criminal Justice Data Banks*, *supra* note 1550, at 5-7 (statement of Senator Ervin).

the person was found not guilty, is often not added to the record.¹⁵⁵⁵ The injuries resulting from inaccurate information are similar. An employer in Texas managed to get the arrest record of one Tosh from a friend on the Fort Worth police department. He displayed mug shots and rap sheets to discourage voting for the union Tosh was organizing. The record being displayed was for one Charles Tosch, however, a convicted felon. Tosh, the organizer, had been arrested on minor charges and released.¹⁵⁵⁶

The following sections of this Project discuss the development of a right of privacy in state and federal law. Using as an analytical framework the four questions regarding the threats posed by government information-practices to individual privacy, the discussion examines consecutively the common-law privacy tort,¹⁵⁵⁷ state statutes,¹⁵⁵⁸ the federal constitutional law,¹⁵⁵⁹ federal statutes prior to the enactment of the Privacy Act of 1974,¹⁵⁶⁰ and, finally, the new Privacy Act,¹⁵⁶¹ to see how the balance has been struck between the governmental need for information and individual privacy, and to see the extent to which these areas of the law provide adequate protection from the above-mentioned harms. Although the focus of the discussion is on federal law, state statutes and the common law are included in order to give a more complete picture of the themes underlying the development of legal protections for privacy.

B. State Law of Privacy

Citizen-government relationships at the state level are far more numerous and varied than those at the federal level, and are thus, from the point of view of the individual's right of privacy, of considerably greater potential danger. In addition to the revenue and law-enforcement functions conducted at both levels of government, state governments administer, for example, welfare benefits, educational systems, and licensing requirements. These close contacts create a large state appetite for personal information,¹⁵⁶² which is restrained externally by federal and state constitutions, and internally only by the moral, social, and political judgments, both indi-

1555. *See id.* at 19.

1556. 120 CONG. REC. H2452 (daily ed. April 2, 1974) (statement of Representative Moss).

1557. *See* text at notes 1564-625 *infra*.

1558. *See* text at notes 1626-788 *infra*.

1559. *See* text at notes 1789-915 *infra*.

1560. *See* text at notes 1916-65 *infra*.

1561. *See* text at notes 1966-2214 *infra*.

1562. For an overview of the dimensions of state record-keeping see Project, *supra* note 1525. One commentator has identified at least a dozen personal information files that any "ordinary young adult" can expect the government to have. *See* Karst, "The Files": Legal Controls over the Accuracy and Accessibility of Stored Personal Data, 31 LAW & CONTEMP. PROB. 342 (1966).

vidual and collective, of state legislators and administrators. This section considers the scope of the states' power to collect, retain, and disseminate information about individuals, and evaluates the effectiveness of state common-law, constitutional, and statutory recognitions of the individual's right of privacy in protecting the individual from unwanted and unwarranted governmental intrusions. The conclusion reached is that while the fundamental notion of a "right to be let alone"¹⁵⁶³ is sufficiently broad to protect against such intrusions, the legal development of this right in the narrow context of private litigation and ad hoc legislation has so stunted the concept that it is today insufficiently responsive to the particular problems of government information-handling.

1. Common-Law Protection of Privacy

Common-law tort actions for invasion of privacy,¹⁵⁶⁴ now recognized in a majority of jurisdictions,¹⁵⁶⁵ provide only a limited restraint against governmental action because of the state's power to override common-law rights by explicit statutory authorization,¹⁵⁶⁶ and because the doctrines of sovereign immunity¹⁵⁶⁷ and govern-

1563. Warren & Brandeis, *supra* note 1523, at 195, quoting T. COOLEY, *TORTS* 29 (2d ed. 1888).

1564. Tortious invasion of privacy has been the subject of considerable comment over the years. See, e.g., A. MILLER, *supra* note 1503; A. WESTIN, *supra* note 1501; Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Brodie, *Privacy, the Family and the State*, 1972 U. ILL. L.F. 743; Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966); Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526 (1941); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962); Comment, *Tortious Invasion of Privacy in Tennessee*, 38 TENN. L. REV. 260 (1971).

1565. See Prosser, *supra* note 1564, at 386-88 (listing 27 states that accepted the tort outright); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 804 (4th ed. 1971) (listing six more states). To these lists may be added Texas, see *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1968), and perhaps Massachusetts, see *Commonwealth v. Wiseman*, 356 Mass. 251, 249 N.E.2d 251 (1969), and Washington. See *Eddy v. Moore*, 5 Wash. App. 334, 487 P.2d 211 (1971) (giving express recognition to the constitutional right and using language that indicated it might feel constrained to recognize the tort in the future). The tort has been expressly rejected in Nebraska, see *Brunson v. Ranks Army Store*, 161 Neb. 517, 73 N.W.2d 803 (1955), Wisconsin, see *Yoeckel v. Samonig*, 272 Wis. 430, 75 N.W.2d 925 (1956), and Rhode Island. See *Henry v. Cherry & Webb*, 30 R.I. 13, 73 A. 97 (1909). Tennessee has been counted on both sides of the fence. See Prosser, *supra*, at 387; Comment, *supra* note 1564, at 261. Dean Prosser has speculated that the developing constitutional right might require these states to recognize the tort right. See W. PROSSER, *supra*, at 816.

In addition to the states recognizing the common-law tort, four states provide statutory recognition of a cause of action for invasion of privacy. See N.Y. CIV. RIGHTS LAW § 50 (McKinney 1948); OKLA. STAT. ANN. tit. 21, § 839.1 (Supp. 1972); UTAH CODE ANN. § 76-9-401 (Supp. 1973); VA. CODE ANN. § 8-650 (1957).

1566. See R. POUND, 3 JURISPRUDENCE 612, 654-59 (1959). See also *id.* at 663-64 (regarding the traditional doctrine of strict construction of statutes in derogation of common law).

1567. It is well established that a state is not liable in tort unless it gives consent.

mental immunity¹⁵⁶⁸ may preclude the individual from obtaining a remedy. Moreover, the rigid, often mechanically applied requisites of the privacy cause of action, which have gradually developed since the tort was first recognized in the late nineteenth century, have made the common-law action an often ineffective tool in protecting the individual from the threats to privacy that are peculiar to government information-handling. Nevertheless, the concept of privacy embodied in the tort law is of consequence in that it manifests the significance that society attaches to this right, a significance that is often reflected in legislative treatment of personal information. In addition, the tort law of privacy provides a useful argument in trying to limit ambiguous state statutes, and many states have incorporated its protections into their freedom of information statutes as an exemption to the general requirement of disclosure.¹⁵⁶⁹

There are two fundamentally different views of the common-law right of privacy, which partially reflect different perceptions of the dangers against which the tort right should protect. The 1890 law review article by Samuel Warren and Louis Brandeis,¹⁵⁷⁰ which first called for recognition of a right of privacy, contained elements of both. On the one hand the authors called for a unitary right

See, e.g., *Faber v. State*, 143 Colo. 240, 353 P.2d. 609 (1960); *Lewis v. State*, 96 N.Y. 71 (1884); W. PROSSER, *supra* note 1565, at 975. In all states consent has been given to a greater or lesser extent, but such legislation has been narrowly construed in favor of the states. *Id.* at 975-76. *See generally* Shumate, *Tort Claims Against State Governments*, 9 LAW & CONTEMP. PROB. 242 (1942); Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363 (1954).

1568. *See, e.g.,* *Barr v. Matteo*, 360 U.S. 564 (1959) (plurality decision) (extending an absolute privilege to all federal officials for acts done in connection with mandatory or discretionary duties). Some state courts recognize only a qualified privilege that does not shield state officers from liability for willful or malicious conduct. *See, e.g.,* *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962) (holding that the claim that two police officers had maliciously divulged plaintiff's arrest record, knowing that he would lose his job, stated a cause of action against the officers for invasion of privacy). In addition, the "official" privilege is declared by statute in some states. *See, e.g.,* CAL. CIV. CODE § 47.1 (West 1954), *construed in* *White v. State*, 17 Cal. App. 3d 621, 95 Cal. Rptr. 175 (1971). In *White*, the plaintiff claimed that the defendants had been guilty of negligence in disseminating an erroneous arrest record and the court held that the complaint was properly dismissed. However, where records are required by statute to be kept confidential, a cause of action for wrongful disclosure may be implied. *See* text at note 1759 *infra*. In such cases official immunity would not apply since the act was done in violation, not in pursuit, of official duties.

1569. Many state open-records laws, like the federal Freedom of Information Act, *see* 5 U.S.C. § 552(b)(6) (1970), specifically exempt records the disclosure of which would constitute an unwarranted invasion of privacy. *See* notes 1218-19 *supra* and accompanying text; text at notes 700-44 *supra*. These provisions are often given content by reference to tort-law principles. *See* note 701 *supra*. In addition, the typical exemption for records "otherwise made confidential by law" has been construed in some states to include the common-law right of privacy. *See, e.g.,* Tex. Atty. Gen. Open Records Dec. No. 2 (Sept. 10, 1973).

1570. Warren & Brandeis, *supra* note 1523. This article has been called a "model of how effectively presented legal scholarship can lead to a change in the law." A. MILLER, *supra* note 1503, at 170.

protecting one's "inviolable personality,"¹⁵⁷¹ which, they suggested, should protect all emotions, ideas, and sensations, in whatever form expressed, and all activities and private facts not made public by the individual. The authors' specific concern, on the other hand, was with a prying and aggressive press that thrived on publication of private, often embarrassing details about individuals.¹⁵⁷² The relationship between the new privacy right and the principles of free speech and free press was therefore a major concern of the article; the privacy cause of action actually delineated was narrowed by two broad exceptions allowing "any publication of matter which is of [legitimate] public or general interest,"¹⁵⁷³ and "any publication made by one in the discharge of some public or private duty."¹⁵⁷⁴ Moreover, similar concerns led the authors to rely on concepts established in the law of defamation. Their specific proposal thus dealt only with publication of personal information rather than with intrusions into "inviolable personality" resulting from the mere acquisition and retention of information.

Perhaps because the period following the publication of the Warren and Brandeis article was a time of rapid technological growth, shifting population patterns, and changing conceptions of the relationship between the individual and his community,¹⁵⁷⁵ the tort de-

1571. Warren & Brandeis, *supra* note 1503, at 205. In searching for the legal principle that would protect privacy, the authors analyzed the cases allowing recovery for publication of private matter on theories of common-law copyright, implied contract, or breach of confidence. They concluded that the results in these cases were not fully explained by narrow property or contract theories. "[T]he protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts . . . is merely an instance of the enforcement of the more general right of the individual to be let alone. . . . The principle which protects . . . personal production, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolable personality." *Id.*

1572. The article was written at a time when "yellow journalism" was reaching its peak. Apparently Mr. Warren was inspired to initiate the project by the extensive and, to him, offensive coverage that his daughter's wedding received in the press. Prosser, *supra* note 1564, at 383. Warren and Brandeis exclaimed:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. . . . The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual . . ."

Warren & Brandeis, *supra* note 1523, at 196. As other commentators have pointed out, there was little or no threat to privacy when snooping was "inhibited by the natural limitations of the human eye [and] ear," A. MILLER, *supra* note 1503, at 171, or when there was a "degree of mutual interdependence among neighbors which generated tolerance and tended to mitigate the harshness of the whispered disclosure." Bloustein, *supra* note 1564, at 984.

1573. Warren & Brandeis, *supra* note 1523, at 214.

1574. *Id.* at 217.

1575. See generally J. ELLUL, *THE TECHNOLOGICAL SOCIETY* (1964); M. McLuhan, *THE GUTENBERG GALAXY* (1962).

veloped in a state of disarray.¹⁵⁷⁶ In 1960, Dean Prosser sought to order the chaos with a new analysis of the tort, which he characterized as

not one tort but a complex of four. The law of privacy comprises four distinct kinds of invasions of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common Without any attempt to exact definition, these four torts may be described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.¹⁵⁷⁷

The Prosserian analysis quickly gained wide acceptance.¹⁵⁷⁸ While Warren and Brandeis' lofty ideal of the inviolate personality was not entirely forgotten, Prosser's compartmentalization of the privacy tort indicated that, as judicially developed, the tort remained close to their specific, more limited, proposal.

In each of the four branches of the tort, Prosser identified the factors employed by courts to separate wrongful invasions of protected interests from acceptable social interaction in an increasingly crowded world. In each case, "[t]he protection afforded [by the tort] to the plaintiff's interest [is] relative to the customs of the time and place, to the occupation of the plaintiff, and to the habits of his neighbors and fellow citizens."¹⁵⁷⁹ The test of what is "offensive or objectionable to a reasonable man,"¹⁵⁸⁰ applies in different ways to the intrusion,¹⁵⁸¹ disclosure,¹⁵⁸² and false light¹⁵⁸³

1576. See Prosser, *supra* note 1564, at 407. Prosser quotes Judge Biggs, who, in *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485 (3d Cir. 1956), likened the tort to a "haystack in a hurricane."

1577. Prosser, *supra* note 1564, at 389. Prosser's analysis was based on "something over three hundred cases in the books" at the time. *Id.* at 388. Cases on invasion of privacy are also collected in Annot., 138 A.L.R. 22 (1942); Annot., 168 A.L.R. 446 (1947); Annot., 14 A.L.R.2d 750 (1950).

1578. Writing in 1962, Dean Wade pointed out that five state courts had already quoted Prosser's analysis. See Wade, *supra* note 1564, at 1095 n.13. Prosser is still widely quoted as a leading authority in the field. See, e.g., *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973).

1579. RESTATEMENT (SECOND) OF TORTS, § 652D, Comment *d* (Tent. Draft No. 13, 1967).

1580. Prosser, *supra* note 1564, at 390-91.

1581. See *id.* An actionable intrusion must involve prying into some matter that is, and is entitled to be, private. Thus, both the act of intruding and the matter intruded upon must be "offensive." The example given by Prosser of an unobjectionable intrusion involved a landlord calling to ask for rent on a Sunday, which was offensive to the plaintiff, but would not be to an ordinary person. See *Horstman v. Newman*, 291 S.W.2d 567 (Ky. 1956). Initially the intrusion tort was related to physical trespass,

branches. The intrusion¹⁵⁸⁴ and disclosure¹⁵⁸⁵ branches also protect only matters that are in fact private; there is no protectible interest in activities done in a public place¹⁵⁸⁶ or in matters of public record.¹⁵⁸⁷ The requirement of publicity is a further limitation on

but it has grown with technology to encompass electronic eavesdropping. Prosser, *supra* note 1564, at 391. RESTATEMENT (SECOND) OF TORTS, § 652B (Tent. Draft No. 13, 1967) imposes liability on "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another." See also *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973).

1582. In the disclosure branch of the tort, whether the revelation would be offensive to a reasonable person must be tested against prevailing community standards. Prosser, *supra* note 1564, at 396. Thus the boundaries of the zone of privacy are somewhat vague. Intimate details of family life or sexuality are clearly within the zone, see, e.g., *Garner v. Triangle Publications*, 97 F. Supp. 546 (S.D.N.Y. 1951), while matters relating to one's business life are not. For example, in *Patton v. Royal Indus., Inc.*, 263 Cal. App. 2d 760, 70 Cal. Rptr. 44 (1968), the court held that the complaint did not state a cause of action for invasion of privacy because: "There was absent a statement of fact relative to their private lives or any other secret matter, and although the statements were defamatory they reflected exclusively upon the professionally [sic] standing of the plaintiffs in the public view." 263 Cal. App. 2d at 766-68, 70 Cal. Rptr. at 48. However, publication of a private debt is generally actionable. See, e.g., *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927).

1583. The parameters of the "false-light" branch of the tort are blurred by its close connection with the law of defamation. Prosser, *supra* note 1564, at 400-01. See also *Wade*, *supra* note 1564, at 1093. While the false disclosure need not be defamatory, it must be something that would be objectionable to a reasonable person under the circumstances. As in the disclosure cases, see note 1582 *supra*, something of a "mores" test must be applied.

1584. Prosser, *supra* note 1564, at 390-91.

1585. *Id.* at 394.

1586. *Id.* at 395. The leading case is *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953), holding that publication of a photo of plaintiff embracing his wife in a public market was not an invasion of privacy.

1587. Prosser, *supra* note 1564, at 395-96. See, e.g., *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948) (newspaper coverage of divorce proceedings not actionable); *Bell v. Courier-Journal & Louisville Times Co.*, 402 S.W.2d 84 (Ky. 1966) (report of judge's delinquent taxes not actionable). The RESTATEMENT (SECOND) OF TORTS, § 652D, comment c (Tent. Draft No. 13, 1967), explains: "[T]here is no liability [for invasion of privacy] for giving publicity to facts about the plaintiff's life which are matters of public records. . . . On the other hand, if the record is one not open to public inspection . . . it is not public and there is an invasion of privacy when it is made so." Thus, in *Patterson v. Tribune Co.*, 146 S.2d 623 (Fla. App. 1962) a newspaper was held liable for republication of a court docket showing plaintiff's voluntary narcotic commitment proceeding, on the basis of a statute, Law of June 15, 1953, ch. 28233, § 4 [1953] (repealed 1970), limiting access to the records of such proceedings. See also *Cox Broadcasting Corp. v. Cohn*, 43 U.S.L.W. 4343 (U.S. March 3, 1975). In that case the Georgia supreme court had held that publication of the name of a rape-murder victim violated her father's common-law right of privacy. A state statute, GA. CODE ANN. § 26-9901 (1972), made such publication a misdemeanor, but the court said that the tort right did not depend upon the statute. 231 Ga. 60, 62, 200 S.E.2d 127, 130 (1973). In reversing the judgment for the plaintiff, the Supreme Court showed considerable sensitivity to the right of privacy, see 43 U.S.L.W. at 4349-52, and confined itself to the circumstances of the case, holding that a state "may not impose sanctions for the publication of truthful information contained in official court records open to public inspection." 43 U.S.L.W. at 4351. The court added that the holding implied nothing about the constitutionality of a state policy "not

the disclosure¹⁵⁸⁸ and false light¹⁵⁸⁹ torts, and is only satisfied when disclosure is to more than a few persons.¹⁵⁹⁰ The disclosure branch is also subject to a privilege for reporting about events and persons of public interest,¹⁵⁹¹ and the defenses of consent and waiver may defeat claims under any of the branches.¹⁵⁹²

On the basis of his analysis, Prosser concluded that the "right of privacy" did not protect a unique or definable interest in what Warren and Brandeis called "inviolate personality,"¹⁵⁹³ but rather addressed the more familiar interests in freedom from mental distress,¹⁵⁹⁴ reputation,¹⁵⁹⁵ and the proprietary interest in name and

allowing access by the public and press to various kinds of official records" 43 U.S.L.W. at 4352 n.26. The separate concurring opinions by Justices Douglas and Powell, *see* 43 U.S.L.W. at 4352, both evidenced a preference for a broader holding, more protective of first amendment rights. However, Justice Powell was willing to allow a different balancing where "a State's desire to protect privacy . . . implicate[s] interests that are distinct from those protected by defamation actions." 43 U.S.L.W. at 4353. *See* Prosser, *supra* note 1564, at 397. *Compare* *Sidis v. F-R Publishing Co.*, 113 F.2d 806 (2d Cir. 1940), *affg.* 34 F. Supp. 19 (S.D.N.Y. 1938), with *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931). *See also* *Briscoe v. Reader's Digest Assn., Inc.*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); *Frick v. Boyd*, 350 Mass. 259, 214 N.E.2d 460 (1966).

1588. *See* Prosser, *supra* note 1564, at 393-94. The requirement of "publicity" is a different standard than the "publication" concept in defamation law. Thus, in addition to newspaper reporting, posting a notice in a public place is sufficient, *see* *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927), but communication to an individual, such as plaintiff's employer, or even to a small group, is not. *See, e.g.,* *Hawley v. Professional Credit Bureau*, 345 Mich. 500, 76 N.W.2d 835 (1956) (to employer); *Gregory v. Bryan-Hunt Co.*, 295 Ky. 345, 174 S.W.2d 510 (1943) (oral accusation of theft before customers in a store).

Publicity is not required if the claim of invasion of privacy is based on breach of a trust or confidential relationship, which affords an independent basis of relief. *See, e.g.,* *Copley v. Northwestern Mut. Life Ins. Co.*, 295 F. Supp. 93 (D. W. Va. 1968).

1589. *See* Prosser, *supra* note 1564, at 400.

1590. *But see* *Copley v. Northwestern Mut. Life Ins. Co.*, 295 F. Supp. 93 (D. W. Va. 1968).

1591. Prosser, *supra* note 1564, at 410-15. *See* *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times Co. v. Sullivan*, 326 U.S. 254 (1964). *See also* A. MILLER, *supra* note 1503, at 190-99.

1592. Prosser, *supra* note 1564, at 419-20. Consent may be given either expressly or implicitly, as by actively seeking publicity. *See, e.g.,* *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941). In either case, if the invasion goes beyond that to which the plaintiff can fairly be said to have consented, there is liability. *See, e.g.,* *Manger v. Kree Institute of Electrolysis*, 233 F.2d 5 (2d Cir. 1956); *Russell v. Marboro Books*, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959).

The concept of waiver is closely tied both to implied consent and to the privilege of reporting on newsworthy events. *See* text at note 1591 *supra*. The terms are used rather loosely: "The utilization of these concepts [consent and waiver] by the courts has been somewhat Draconian and has resulted in an understandable dampening of enthusiasm for pursuing the privacy theory. . . . For example, a woman was held to have 'waived her right of privacy' by leaping from a twelve story building. [*Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (1939)]" A. MILLER, *supra* note 1503, at 185.

1593. *See* Prosser, *supra* note 1564, at 389, 422.

1594. *See id.* at 392, 398, 422. Prosser identifies freedom from mental distress as the interest protected by the intrusion and disclosure torts.

likeness.¹⁵⁹⁶ Prosser's descriptive analysis of the tort's development thus represented a retrenchment from the ideal advocated by Warren and Brandeis. Of greatest significance is the limitation, noted by Prosser, that the publication of private information about an individual is actionable only if the publication is highly objectionable or if the information places the individual in a false light. Prosser's tort recognizes no interest in "selective disclosure," no right simply to control the flow of ordinary information about oneself. Moreover, the acquisition of information is wrongful only if the method by which it is obtained is sufficiently intrusive. This means, stated Prosser, that "[o]n the public street, or in any other public place, the plaintiff has no legal right to be let alone."¹⁵⁹⁷ Finally, none of the aspects of the privacy tort as set forth by Prosser protect against the psychological effect of the retention by government bodies of masses of personal information.

Prosser's analysis of the limitations imposed by the courts on the tort of privacy has been disputed. It has been argued, in particular, that Prosser's compartmentalization of the privacy tort ignores the underlying "spiritual" interest in freedom and individuality suggested by many of the decisions,¹⁵⁹⁸ and has thus, in the language of Warren and Brandeis, prevented "the common law, in its eternal youth, [from] grow[ing] to meet the demands of society."¹⁵⁹⁹ The dispute over whether "privacy" is a single interest or a deceptive term for several distinct interests has important implications for the expansion of the tort. If the Prosserian analysis is retained, the present limitations may be applied without regard to the source of the threat, and the tort will thus fail to recognize the threats to the individual that are unique to government information-handling.¹⁶⁰⁰

1595. *See id.* at 398, 401, 422. Both the disclosure and false light branches are viewed as protecting the interest in reputation.

1596. *See id.* at 406, 423. Under this aspect of the privacy tort there must be some advantage to the defendant. "Under the statutes this must be a pecuniary advantage; but the common law is very probably not so limited." *Id.* at 405-06. Thus, use for political advantage is sufficient. *See, e.g., State ex rel. LaFollette v. Hinkle*, 131 Wash. 86, 229 P. 317 (1924). It has been suggested that what is involved here is not so much a right of privacy as a "right of publicity," i.e., the right to determine when and for whose advantage one's identity will be exposed to the public. *See Nimmer, The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954).

1597. W. PROSSER, *supra* note 1565, at 808.

1598. *See* Bloustein, *supra* note 1564. Reviewing many of the cases on which Prosser based his analysis, Bloustein concluded that "the tort cases involving privacy are of one piece and involve a single tort." *Id.* at 1000. "[T]he interest served in the privacy cases is in some sense a spiritual interest rather than an interest in property or reputation. Moreover . . . the spiritual characteristic which is at issue is not a form of trauma, mental illness or distress, but rather individuality or freedom." *Id.* at 1002.

1599. Warren & Brandeis, *supra* note 1523, at 193.

1600. *See, e.g., Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970), discussed in the text at notes 1608-12 *infra*.

But if the underlying interest in privacy is viewed as a unified, personal right that is an extension of an individual's personality, the limitations can be discarded when it becomes apparent that the fundamental interest has been infringed in a new and unanticipated way. Government's size and its unique capacity to inquire, to remember, and to affect people's lives, enable it to invade privacy in ways that individual defendants cannot. The concept of privacy must be flexible enough to recognize that a governmental act can do more damage to the "inviolable personality" than would the same act by an individual.

The literature on the right of privacy reflects a tension between the fear that it protects a merely trivial interest in a highly interactive society¹⁶⁰¹ and the concern that it should protect the individual from, but often fails to reach, the wrongs affronting "human dignity and individuality."¹⁶⁰² Prosser's retrenchment from the idea of a unitary right of privacy and the impatience of those writers who view the privacy tort as trivial have partially accounted for the hesitancy to advance beyond Warren and Brandeis' specific dislike of "yellow journalism."¹⁶⁰³ The irony is that, in attempting to prune the "most marvelous tree that [grew] from the wedding of the daughter of Mr. Samuel D. Warren,"¹⁶⁰⁴ Dean Prosser delineated a cause of action large enough to redress many petty grievances, but too narrow to cover new threats to the fundamental spiritual interest that Warren and Brandeis were concerned with in a larger sense.

The tort law of privacy is by no means as settled as the oft-quoted Prosserian formula seems to indicate. Some recent cases demonstrate a willingness to relax the limitations of Prosser's tort when an act outside the Prosserian mold causes genuine harm to the "inviolable personality."¹⁶⁰⁵ For example, some courts have suggested that large institutions can violate the right of privacy even

1601. See Kalven, *supra* note 1564. Kalven offers "as an example of the unbeatable triviality of some privacy litigation" the case of *Cohen v. Marx*, 94 Cal. App. 2d 704, 211 P.2d 320 (1949), which was based on a one line reference to "a fighter named Canvasback Cohen" on Groucho Marx's radio show. While the plaintiff, a former boxer, was denied recovery, the case also illustrates Kalven's objection that "[t]he lack of legal profile for the tort makes any sort of unconsented-to reference to the plaintiff look colorable I suspect, therefore, that the achievement of the new tort remedy has been primarily to breed nuisance claims." Kalven, *supra*, at 339.

1602. Bloustein, *supra* note 1564, at 1003.

1603. "One may perhaps wonder if the tort is not an anachronism, a nineteenth century response to the mass press which is hardly in keeping with the more robust tastes of today." Kalven, *supra* note 1564, at 327.

1604. Prosser, *supra* note 1564, at 423.

1605. See *Briscoe v. Reader's Digest Assn., Inc.*, 4 Cal. 3d 529, 533-34, 483 P.2d 34, 37, 93 Cal. Rptr. 866, 869 (1971); *United States v. Kalish*, 271 F. Supp. 968 (D.P.R. 1968); *Eddy v. Moore*, 5 Wash. App. 334, 487 P.2d 211 (1971).

without publicity,¹⁶⁰⁶ and without intrusion into exclusively private areas of one's life.¹⁶⁰⁷

In a number of recent decisions, however, the limitations announced by Prosser have been mechanically applied to defeat a privacy claim without any sensitivity to the magnitude of the threat inherent in institutional handling of personal information. For example, in *Nader v. General Motors Corp.*,¹⁶⁰⁸ in which Ralph Nader charged that GM's campaign to elicit damaging information about him from his friends constituted an invasion of his privacy, the majority said that "the mere gathering of information about a particular individual does not give rise to a cause of action under this theory. Privacy is invaded only if the information sought is of a confidential nature and the defendant's conduct was unreasonably intrusive."¹⁶⁰⁹ The court concluded that questioning third parties

1606. See, e.g., *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962), in which malicious disclosure by police to plaintiff's employer was held to state a cause of action for invasion of privacy. It may be questioned, however, whether this relaxation of the publicity requirement is really a departure from the norm of tort cases. It can be argued that cases holding that disclosure to an employer is not an invasion of privacy, see, e.g., *Hawley v. Professional Credit Bureau*, 345 Mich. 500, 76 N.W.2d 835 (1956), turn on a judgment that the loss of a job is an economic, not a dignitary, harm. See *Bloustein, supra* note 1564, at 980-83. In addition, the publicity requirement has not been an obstacle to the protection of privacy from governmental dissemination, since disclosure to even a single requester under a freedom of information act makes the information "public." Under most freedom of information acts, the requester is not required to show any need for the information he seeks. Thus, the decision to disclose a record to any one requester means that it is open to anyone who cares to see it; in this sense, such a record is clearly made "public." See note 458 *supra* and accompanying text; note 1242 *supra* and accompanying text. See also *Tex. Atty. Gen. Open Records Dec. No. 2* (Sept. 10, 1973), holding that under Prosser's standards, disclosure to a single requester of certain records "would constitute an invasion of privacy by reason of being a public disclosure of private information of a highly objectionable kind." The requester in that case was a newspaper reporter, but the Attorney General did not rely on that fact, nor in any way elaborate on his conclusion that the disclosure was "public." The notion that simply placing the information in the public domain satisfies the publicity requirement is clearly a loosening of the traditional rule, and undercuts the inference that the interest being protected is one's reputation. This understanding that an individual's privacy may be infringed simply by having his identity held up to public view, even if the public never looks, is essential to the protection of the right of privacy in government-held information. A long-standing application of this principle is the general agreement that an acquitted arrestee may force the police to remove his photograph from a "rogue's gallery." See, e.g., *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946), *appeal after retrial*, 225 Ind. 360, 74 N.E.2d 914 (1947), *appeal dismissed*, 333 U.S. 834 (1948); *Itzkovich v. Whitaker*, 117 La. 708, 42 S. 228 (1906); *State ex rel. Reed v. Harris*, 348 Mo. 426, 153 S.W.2d 834 (1941).

1607. See, e.g., *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Cir. 1969) (dictum).

1608. 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

1609. 25 N.Y.2d at 567, 255 N.E.2d at 769, 307 N.Y.S.2d at 652-53. Nader's complaint alleged six specific instances of GM's intrusive conduct, including interviews with his acquaintances, surveillance in public places, attempts to entrap him in illicit relationships, threatening and harassing telephone calls, wiretapping, and harassing investigations. The court upheld the order denying dismissal of the privacy claims to

was not unreasonably intrusive conduct¹⁶¹⁰ and that any information Nader's acquaintances were capable of divulging obviously was not secret.¹⁶¹¹ Judge Breitel's concurrence took issue with this analysis, however, pointing out that the unique capacity of the corporate defendant to damage the plaintiff's right of privacy in this instance should affect the determination of whether the acts complained of were mere annoyances or significant wrongs requiring legal redress.¹⁶¹² If the tort is indeed a "dignitary" one protecting a fundamental spiritual interest rather than a loose mixture of interests in property and reputation, then the damage done by the mere creation or maintenance of a file "unsupported by palpable social excuse or economic justification"¹⁶¹³ is clearly within its spirit.¹⁶¹⁴

Several state attorneys general, dealing with the disclosure tort's "offensive facts" requirement, have also made merely mechanical decisions about threatened privacy violations. For example, one such decision interpreting a state open-records act required disclosure of the names and addresses of freshmen entering a state university to the proprietor of a local bookstore.¹⁶¹⁵ While an individual's student status is hardly such an intimate detail that disclosure to third parties is offensive to most persons, it is disturbing that the offensive facts limitation requires state agencies, without consent and without consideration of opposing interests, to act as market researchers in the service of private interests. A similar state attorney

the extent that they were supported by the allegations of wire-tapping and overzealous surveillance. 25 N.Y.2d at 569-71, 255 N.E.2d at 770-71, 307 N.Y.S.2d at 654-56. But the majority felt compelled to elaborate on its view of the insufficiency of the other allegations "for the guidance of the trial court and counsel." 25 N.Y.2d at 568, 255 N.E.2d at 769, 307 N.Y.S.2d at 653.

1610. 25 N.Y.2d at 569, 571, 255 N.E.2d at 770, 771, 307 N.Y.S.2d at 654, 656.

1611. 25 N.Y.2d at 569, 255 N.E.2d at 770, 307 N.Y.S.2d at 654.

1612. Judge Breitel concurred in the affirmance, but disagreed with the majority's restrictive and unnecessary advice about specific allegations. Breitel pointed out that The real issue in the volatile and developing law of privacy is whether a private person is entitled to be free of certain grave offensive intrusions unsupported by palpable social or economic excuse or justification.

True, scholars, in trying to define the elusive concept of the right of privacy, have, as of the present, subdivided the common law right into separate classifications This does not mean, however, that the classifications are either frozen or exhausted, or that several of the classifications may not overlap.

. . . Although acts performed in "public," especially if taken singly or in small numbers, may not be confidential, at least arguably a right to privacy may nevertheless be invaded through extensive or exhaustive monitoring and cataloguing of acts normally disconnected and anonymous.

. . . It is not unimportant that plaintiff contends that a giant corporation had allegedly sought by surreptitious and unusual methods to silence an unusually effective critic.

25 N.Y.2d at 572-73, 255 N.E.2d at 772, 307 N.Y.S.2d at 656-57.

1613. 25 N.Y.2d at 572, 255 N.E.2d at 772, 307 N.Y.S.2d at 656.

1614. Cf. Goldstein, *Legal Control of the Dossier*, in *ON RECORD* 415, 419 (S. Wheeler ed. 1969).

1615. Tex. Atty. Gen. Open Records Dec. No. 16 (Jan. 15, 1974).

general opinion required disclosure of the race of specific individuals because information regarding race or ethnic background is not “*intrinsically* confidential.”¹⁶¹⁶ While there may be valid reasons for public access to such information,¹⁶¹⁷ the decision to disclose should be based on those reasons rather than on a rigid application of the offensive facts limitation. That limitation may achieve a rough balance of interests in a noninstitutional context, but when the government is the discloser and the potential damage is on a much greater scale, a more flexible and sensitive test is needed.

Similar problems of inflexibility in applying tort concepts to government information-handling are caused by the defenses of consent and waiver. Governmental units that have given no express promise of confidentiality have tried to defeat the claim of privacy on the grounds either that the information is now a matter of public record and therefore no longer private, or that the individual has implicitly consented to the dissemination of information voluntarily disclosed to the government. While courts have not generally regarded the public-record label as conclusive,¹⁶¹⁸ such arguments have met with some success.¹⁶¹⁹ It has been suggested that the privacy claim is strongest with respect to information the government acquires as a result of a coerced relationship, such as arrest records,¹⁶²⁰ and that, by way of contrast, the acceptance of a public benefit constitutes an implied consent to the dissemination of information to anyone properly concerned with the administration of the benefit, perhaps including the public as a whole in its watchdog capacity.¹⁶²¹

1616. Tex. Atty. Gen. Op. No. H-118 (Oct. 3, 1973) (emphasis original).

1617. For example, any effort to assess the effectiveness and integrity of an affirmative action program would require such data. Most state open-records acts do not, however, permit inquiry into the requester's motives in seeking the information. See note 1242 *supra* and accompanying text.

1618. See, e.g., *Jordan v. Loos*, 204 Misc. 814, 125 N.Y.S.2d 447 (Sup. Ct. 1953), holding that parole records are not disclosable under the New York statute requiring the custodian of public records to provide copies on request (N.Y. PUB. OFFICERS LAW § 66 (McKinney 1948)). The fact that parole records had been confidential since the inception of the parole system was important in the court's decision. See 204 Misc. at 819, 125 N.Y.S.2d at 452. In *Gallagher v. Boller*, 231 Cal. App. 2d 482, 41 Cal. Rptr. 880 (1964), the absence of a promise of confidentiality on the face of an application for tax exemption and the voluntary nature of the disclosure led the court to conclude that the information was disclosable. In both of these cases the courts looked for circumstances indicating an expectation of privacy, rather than relying on the “public record” label. See also *MacEwan v. Holm*, 226 Ore. 27, 359 P.2d 413 (1961). Dean Prosser concludes that “[t]he answer may be that the existence of a public record is a factor of a good deal of importance, which will normally prevent the matter from being private, but that under some special circumstances it is not necessarily conclusive.” Prosser, *supra* note 1564, at 396.

1619. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 43 U.S.L.W. 4343, 4351 (U.S. March 3, 1975), discussed in note 1587 *supra*.

1620. See *Karst*, *supra* note 1562, at 344 n.10.

1621. See, e.g., *MacEwan v. Holm*, 226 Ore. 27, 38, 359 P.2d 413, 418 (1961). Cf. *Gallagher v. Boller*, 231 Cal. App. 2d 482, 492, 41 Cal. Rptr. 880, 886 (1964) (observing

Although the element of voluntarism is a proper consideration in assessing a privacy claim, this blanket rule ignores the fact that many government benefits, such as welfare benefits, are of such importance to the individual that any appearance of choice in accepting the benefit is merely illusory.¹⁶²² In the government setting, the concept of consent and waiver must be applied in a manner that accounts for inequality of bargaining position.¹⁶²³

Thus, if the current Prosserian view of the tort law of privacy is adopted as a prescriptive delineation of the limits of societal concern for privacy and applied in unmodified form to governmental acquisition and handling of personal information, many important privacy interests are left unprotected. Despite broader views of this developing area of tort law, there is a danger that state agencies, courts, and legislatures will rely on the seemingly firm and authoritative outlines of Prosser's tort.¹⁶²⁴ In order to deal with the newly perceived governmental threat to privacy, courts, legislatures, and all other shapers of the law must update the concept of privacy as a "bulwark built up against the threatened annihilation of man's personal life."¹⁶²⁵

2. State Constitutional and Statutory Protection of Privacy

The development of the common-law privacy right necessarily has suffered from the ad hoc approach of case adjudication, a method of development that leaves many aspects of the common law in doubt. While constitutional or statutory provisions could define the right of privacy comprehensively, few states have enacted such provisions.¹⁶²⁶

Although the source of the federal constitutional right of privacy is not well-defined,¹⁶²⁷ it is clear that the federal Constitution accords individual privacy a degree of indirect protection flowing from the limits of the federal government's enumerated powers.¹⁶²⁸

that the absence of statutory confidentiality for records relating to tax-exempt status was reasonable since an institution claiming such status could fairly be required to submit to public scrutiny in exchange for relief from its tax obligation).

1622. Welfare is the clearest example—it can hardly be said that the choice between privacy and starvation is a free one. *Cf. Shapiro v. Thompson*, 394 U.S. 618 (1969). Even in the more mundane area of driver's licenses it is clear that one must pay a considerable price for anonymity.

1623. *See* A. MILLER, *supra* note 1503, at 187.

1624. *See, e.g.,* Tex. Atty. Gen. Open Records Dec. No. 2 (Sep. 10, 1973), applying Prosser's standards to determine whether certain records were disclosable under the state open-records act.

1625. Nizer, *supra* note 1564, at 559.

1626. The only exceptions are the new Minnesota and Utah privacy acts. MINN. STAT. ANN. §§ 15.162-.168 (Supp. 1975); Ch. 194, §§ 1-12, [1975] Laws of Utah 870. *See* text at notes 1768-87 *infra*.

1627. *See* text at notes 1825-30 *infra*.

1628. *See* text at notes 1789-824 *infra*.

Unlike the federal government, however, the state governments possess a plenary residual power to adopt measures, and hence to gather information, in a wide range of contexts.¹⁶²⁹ This power is subject to no significant inherent limitations other than the restraints resulting from the operation of the supremacy clause of the federal Constitution,¹⁶³⁰ the restraints imposed by the federal Bill of Rights, and the restraints contained in the state constitutions.

Some state constitutions expressly recognize a right of privacy,¹⁶³¹ but few decisions interpreting such provisions go beyond the scope of the federally protected constitutional right.¹⁶³² Indeed, California and Alaska seem to be alone in developing broad state constitutional protection for this right.¹⁶³³ A general state constitutional provision creating or protecting a right of privacy can be of significant value in developing greater protections for the individual privacy interests. Such a provision could, with broad judicial interpretation, develop a right of privacy almost as comprehensive and effective as any enacted by a state legislature. Moreover, general constitutional protection of privacy would permit courts to interpret statutes and regulations that affect privacy, such as those dealing with the handling of personal information, with greater sensitivity to the privacy interest than

1629. See F. MICHAELMAN & T. SANDALOW, *MATERIALS ON GOVERNMENT IN URBAN AREAS* 20 (1970). It has been suggested that the introduction of the due process residual personal rights concepts to the discussion of state power to regulate individual conduct in *Griswold v. Connecticut*, 381 U.S. 479 (1965), might revive the doctrine that the state's police power to regulate for the general welfare must be exercised only for public purposes. See, e.g., Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1057-71 (1968). However, Michaelman and Sandalow note that as a matter of practice, courts never challenge a state's decision that an enactment serves a public purpose. See F. MICHAELMAN & T. SANDALOW, *supra*, at 110.

1630. U.S. CONST. art. VI, cl. 2.

1631. See, e.g., ALAS. CONST. art. I, § 22; CAL. CONST. art. I, § 1; ILL. CONST. art. I, § 6.

1632. For example, in *Stein v. Howlett*, 52 Ill. 2d 570, 289 N.E.2d 409 (1972), *appeal dismissed*, 412 U.S. 925 (1973), the court said that campaign disclosure requirements infringed upon a privacy right protected by the state constitution, but held that this was justified by the state's compelling interest in eliminating abuses of public office. In an earlier case, *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970), the California supreme court had struck down a similar statute as a violation of the federal right of privacy.

1633. In *White v. Davis*, 13 Cal. 3d 757, 553 P.2d 222, 120 Cal. Rptr. 94 (1975), the California supreme court unanimously held that undercover police surveillance of university classes was "a prima facie violation of the state constitutional right [of privacy]." 13 Cal. 3d at —, 553 P.2d at 234, 120 Cal. Rptr. at 106. Quoting extensively from the state's election brochure as an aid to construction of the 1972 amendment creating this right, the court said that it was specifically aimed at "the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society 'At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian.'" 13 Cal. 3d at —, 553 P.2d at 233, 120 Cal. Rptr. at 105. In *Ravin v. State*, 43 U.S.L.W. 2502 (Alas. May 27, 1975), the court relied on both federal privacy law and the Alaska constitutional provision to prohibit prosecution for the possession or use of marijuana within the home.

might otherwise be possible. It seems clear, however, that a constitutional provision alone, either as adopted or as interpreted, cannot adequately protect the individual from government's information demands. Judicial development of a general constitutional right of privacy would, like the common-law right, be limited by the individual litigation context. In an area like privacy where conflicting interests are many and varied (and often unrepresented in a particular judicial controversy) and the need to balance these interests is critical, case law is too imprecise a tool to shape a broad policy for the handling of personal information by the government.

Even a constitutional provision aimed specifically at the problem of government information-handling would not be wholly satisfactory. A right of privacy tied to a constitutional provision is inherently inflexible and difficult to change: An improper balance struck by a state judiciary or a balance no longer desirable in light of changed conditions is outside of the legislature's power to alter. Finally, total reliance on a constitutional right of privacy generates the assumption that the government *should* exercise its power right up to the limits of the individual's constitutional right to resist. The conflict between the government's need for information and the individual's right of privacy involves questions of political judgment. Even in the face of a generous constitutional provision, it is to be hoped that the legislature will refrain from unnecessary, though constitutionally permissible, intrusions. A government information-handling policy of sufficient sensitivity and responsiveness to both individual and governmental interests can be achieved more successfully in a setting in which those administering the policy have a voice in its development. Such a policy would recognize that the most potent protection of the right of privacy lies with the political judgment of the legislatures to refrain from unnecessary intrusion upon individual lives. Unfortunately, the present state statutes regulating the acquisition, retention, and dissemination of personal information reflect almost no consideration of the privacy interests of the subjects of government files.

The state governments' power flows through agencies to which specific governmental functions have been delegated. The delegation of state powers to act in many contexts carries with it either an express or an implied power to acquire information.¹⁶³⁴ The delegation of state power in theory could constitute a significant limitation on the scope of agency power to acquire information, but such restrictions in practice are of minimal scope and significance. When the delegating statute does not limit the type of information an agency may collect it has been held that an agency may collect any information reasonably necessary to the performance of its

1634. See Goldstein, *supra* note 1614.

functions.¹⁶³⁵ This standard has resulted in no real limitations on agency information acquisition because courts have thus far been reluctant to substitute their judgment of necessity for that of the agency that uses the information.¹⁶³⁶

Most statutes provide no basis for any greater limitation on agency powers to acquire information. For example, the statutes delegating power in connection with the welfare, licensing, taxation, education, and police functions manifest little concern with the proper limits of state information-gathering. In administering welfare benefits, granting drivers licenses, or collecting taxes, a state agency clearly needs detailed information about individuals in order to decide whether to grant a benefit or impose a burden,¹⁶³⁷ and the substantive requirements of these programs largely determine the agency's information needs.¹⁶³⁸ Perhaps because in most instances the need for information is obvious, statutes delegating these functions typically do not delineate information-gathering functions.¹⁶³⁹

1635. See, e.g., *Belmont v. State Personnel Bd.*, 36 Cal. App. 3d 518, 111 Cal. Rptr. 607 (1974) (state welfare agency); *California Portland Cement Co. v. State Bd. of Equalization*, 67 Cal. 2d 578, 432 P.2d 700, 63 Cal. Rptr. 5 (1967) (property tax board).

1636. *DATABANKS*, *supra* note 1502, at 379. For example, in *Belmont v. State Personnel Bd.*, 36 Cal. App. 3d 518, 111 Cal. Rptr. 607 (1974), two psychiatric social workers attempted to resist an order to provide case history information on their welfare clients to a new computerized information system on the ground that such information was not necessary to the state welfare agency's functions. The court held that some relevancy to the agency's functions was sufficient to support the inquiry and further, that the determination of "necessity" was "best left to the agency charged by law with making it." 36 Cal. App. 3d at 524, 111 Cal. Rptr. at 610. The same standard of "reasonable relevance" has been applied to inquiries by a state taxing authority, see *California Portland Cement Co. v. State Bd. of Equalization*, 67 Cal. 2d 578, 432 P.2d 700, 63 Cal. Rptr. 5 (1967), and by the police. See *Anderson v. Sills*, 56 N.J. 210, 265 A.2d 678 (1970).

1637. See, e.g., *Zimmerman, Record Keeping and the Intake Process in a Public Welfare Agency*, in *ON RECORD* 319 (S. Wheeler ed. 1969).

1638. In the welfare area, the variety of eligibility requirements imposed on welfare programs, see, e.g., *Zimmerman*, *supra* note 1637, at 322, and the fact that the eligibility inquiry will necessarily touch on inherently personal matters of family life, make informational intrusion a very sensitive problem: "Closely related to stigma is the problem of privacy. Disclosing assets and resources, revealing the names of one's friends and associates, submitting to investigation and questioning . . . these are the price of receiving welfare. Loss of privacy is loss of dignity and is part of the shame of being a welfare recipient." *Handler & Hollingsworth*, *supra* note 1544, at 2. Arguably, any significant curtailment of the degree of inquiry intrusion associated with receipt of welfare benefits would require a fundamental restructuring of the system, for example, the elimination of characteristics of family life as criteria of eligibility. *Handler & Rosenheim, Privacy in Welfare: Public Assistance and Juvenile Justice*, 31 *LAW & CONTEMP. PROB.* 377, 378-94 (1966).

1639. For example, many statutes authorize the administering agency to prepare application forms that call for certain specified information and "such other information as the agency may require" (or similar language). In the areas of motor vehicle licensing, see *NEV. REV. STAT.* § 483.290 (1967); *R.I. GEN. LAWS ANN.* § 31-10-12 (1968); *MO. ANN. STAT.* § 302.171 (1969); *MONT. REV. CODES ANN.* § 31-130 (1961), as amended (Supp. 1974), taxation, see *GA. CODE ANN.* § 92-3208 (1974); *TENN. CODE ANN.* § 67-2614 (1955); *N.M. STAT. ANN.* § 17-15A-10 (Supp. 1974); *N.D. CENT. CODE* § 57-38-42 (1960);

In the area of education, in particular, detailed records are often constructed to measure the effectiveness of the educational process,¹⁶⁴⁰ many times with the aim of drawing a complete portrait of the subject by including many kinds of objective and subjective data.¹⁶⁴¹ Because local communities have principal responsibility for education,¹⁶⁴² state statutes generally do not regulate the gathering of information by schools, and local practices with respect to the content of school records vary considerably.¹⁶⁴³ While it has been questioned whether schools should be concerned with nonacademic information like family characteristics, background, and personality,¹⁶⁴⁴ there are at present no statutory constraints on the power of school authorities to gather such information.¹⁶⁴⁵

In the area of criminal law, information-gathering has been the subject of express statutory concern. Nearly all states have statutes requiring the collection of identification data concerning persons arrested for or convicted of certain offenses.¹⁶⁴⁶ These statutes typically govern the activities of a state bureau of criminal identification, which aids local and federal law enforcement officials by providing

VT. STAT. ANN. tit. 32, § 5867 (1970), and welfare applications. See N.J. STAT. ANN. § 44:8-121 (1953); HAWAII REV. STAT. §§ 346-10, 346-72 (1968); MONT. REV. CODES ANN. § 71-231 (1947); MO. ANN. STAT. § 205.940 (1972). The federal regulation governing applications and investigations under the federally funded aid programs does not delineate the scope of permissible inquiry but merely requires that "[s]tandards and methods for determination of eligibility shall be consistent with the objectives of programs, and shall respect the rights of individuals [under the Constitution and relevant state and federal statutes]." 45 C.F.R. § 206(10)(a)(10) (1974).

1640. Goslin & Bordier, *Record-Keeping in Elementary and Secondary Schools*, in ON RECORD 29 (S. Wheeler ed. 1969).

1641. Goslin & Bordier, *supra* note 1640, at 61-65. School authorities take the position that society's increasingly broad expectations of the educational process require a great deal of information about the "whole child." See also Divoky, *Cumulative Records: Assault on Privacy*, reprinted in *Privacy, Joint Hearings on S. 3418, S. 3633, S. 3116, S. 2810, S. 2542 Before the Ad Hoc Subcomm. on Privacy and Information Systems of the Senate Comm. on Government Operations and the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 1773 (1974) [hereinafter *Joint Hearings*].

1642. Goslin & Bordier, *supra* note 1640, at 41.

1643. *Id.* at 43-49. Some states do, however, impose affirmative obligations on school boards to maintain certain types of student records. See, e.g., OHIO REV. CODE ANN. § 3319.32 (Page 1972).

1644. See Goslin & Bordier, *supra* note 1640, at 61-65.

1645. See Divoky, *supra* note 1641, at 1773. The sole possible exception is an interesting Rhode Island statute that prohibits the use in schools of questionnaires that would invade the privacy of the pupils without prior approval of the school board. See R.I. GEN. LAWS ANN. § 16-38-5 (1969).

1646. See, e.g., ALAS. STAT. § 12.62.020 (1962); CONN. GEN. STAT. ANN. § 29-12 (1958); DEL. CODE ANN. tit. 11, § 8519 (1953); N.J. STAT. ANN. § 53:1-15 (1953); N.M. STAT. ANN. § 39-3-8 (1953); OHIO REV. CODE ANN. § 109.60 (Page 1964). See also Arrest/Crim. ID statutes coded "A" and "O" in *Chart*, appendix to this section. Typically these statutes require state and local police to obtain fingerprints and "other identification data" on persons arrested for felonies, or "serious crimes" and other named offenses, and to forward such information to a central state bureau of criminal identification.

data for the identification of criminals.¹⁶⁴⁷ The collection of information for such an agency is thus an end in itself, rather than an adjunct to the performance of another function. With rare exceptions¹⁶⁴⁸ the statutes do not limit the scope of information collection, but merely establish minimum information requirements for the statewide criminal identification system.¹⁶⁴⁹ Even recent comprehensive reforms of criminal identification systems¹⁶⁵⁰ have concentrated on the problem of retention of identification data, rather than on the problem of acquisition.¹⁶⁵¹

While given broad discretion by delegating legislation, most state agencies are confronted with internal restraints on information gathering, such as formal guidelines or fiscal and storage-space limitations.¹⁶⁵² Such self-restraint provides, however, only the roughest of safeguards against privacy violations. A frequent contention of agencies, whether or not accurate, is that their increased efficiency depends upon the accumulation of more information,¹⁶⁵³ and it is likely that those agencies that most clearly perceive a need for data are least apt to give full weight to the individual's countervailing claim to privacy. Moreover, even assuming that most agencies are concerned with the privacy rights of citizens,¹⁶⁵⁴ each agency can

1647. See Arrest/Crim. ID statutes code "B" in *Chart*, appendix to this section.

1648. An Oklahoma statute provides that the duty of local police to obtain fingerprints "is not intended to include violators of city or town ordinances, or persons arrested for ordinary misdemeanors, and great care shall be taken to exclude such persons." OKLA. STAT. ANN. tit. 74, § 158 (1961). It is not clear, however, whether the statute prohibits the taking of fingerprints in such cases, or merely prohibits the filing of such identification data in the central system.

1649. See, e.g., *State v. Accor*, 277 N.C. 65, 175 S.E.2d 583 (1970) (holding that a state statute requiring fingerprinting of persons charged with certain crimes neither authorized nor prohibited the fingerprinting of persons not charged with such a crime); 40 N.C. ATTY. GEN. OP. 173 (1970) (concluding that a limitation in the same statute on photographing misdemeanants did not limit local police authority to fingerprint misdemeanants).

1650. See, e.g., IOWA CODE ANN. §§ 749.1 (1950), as amended, (Supp. 1974) (the Iowa TRACIS Act, analyzed in Note, *The Dissemination of Arrest Records and the Iowa TRACIS Bill*, 59 IOWA L. REV. 1162 (1974)); ALAS. STAT. §§ 12.62.010-070 (1972).

1651. For example, the Iowa TRACIS Act "does not directly control the collection and dissemination of surveillance data by law enforcement agencies, [but] these practices seem to be significantly constrained by prohibiting the storage of such data in any files—manual or automated," Note, *supra* note 1650, at 1174 (emphasis original), and ALAS. STAT. § 12.62.020 (1972), provides that only information specifically required by state statute may be entered on the computerized statewide identification system. See note 1675 *infra*.

1652. Project, *supra* note 1525, at 1434-73, Table 6.

1653. "Nearly all questioned agencies desired additional types of information in their files, but indicated that financial considerations limit the gathering of such information." *Id.* at 1434.

1654. The UCLA Project, *supra* note 1525, indicates, as might be expected, that there are differences of opinion among state officials as to the degree of deference due the privacy rights of individuals: "The majority of agency directors interviewed agreed that certain subjects were not proper items for governmental inquiry; but this general

perceive the problem only from the vantage point of its own informational needs and is thus unlikely to be sensitive to the cumulative threat to privacy posed by the compilation of multiple dossiers and the possibility of inter-agency correlation of information.¹⁶⁵⁵ The legislature or a similar overseeing body is probably most capable of the type of coordination of state information-demands that is necessary to guard against the psychological impact and chilling effect of large-scale information-gathering.¹⁶⁵⁶

In light of the varied information needs of state agencies and administrators, and the risk that agency performance would be frustrated if specific limitations on information-gathering were imposed without knowledge of particular agency problems, it is understandable that legislatures have been unwilling to restrain significantly information-handling processes. There is little reason, however, why delegating legislation cannot contain policy directives and, in areas where legislatures feel capable of assessing conflicting interests, specific proscriptions against clearly undesirable practices. A statute listing the items of information an agency can acquire would have to be based on intimate knowledge of the agency's operations and would hamper the agency's ability to respond to changed circumstances; in contrast, a statement that privacy interests must be considered in an agency's information policy would both limit administrative discretion and allow courts greater leeway to accommodate the interests of information subjects. Moreover, if administrators were evaluated on the basis of their compliance with these policy directives it would not be unreasonable to expect that most administrators would make some effort to effectuate them.

Like the determination of what information to acquire, the decision as to how long a given file is to be retained is almost always left to the discretion of the record keeper. In areas like welfare and motor vehicle licensing, housekeeping statutes authorizing the destruction of records after a certain time are common,¹⁶⁵⁷ but statutes

agreement was opposed by a hard-core dissent to the effect that no information could be rightly classified as 'none of the government's business.'" *Id.* at 1434.

1655. Indeed, what some commentators view as a dangerous threat to privacy may be viewed by a government agency as a valid part of its function. For example, it has been suggested that one of the primary dangers of a dossier society is the power of the file to control social behavior. *See, e.g., A. MILLER, supra* note 1503, at 50. *Cf. Project, supra* note 1525, at 1416-22. But under existing legislation it is not entirely clear that controlling social behavior is an improper purpose of the educational, police, and, perhaps, social welfare institutions.

1656. This overview function could be served, for example, by a procedure for administrative review of collection practices. At the federal level, such review authority is vested in the Office of Management and Budget, *see* 44 U.S.C. §§ 3501-11 (1970), *as amended*, 44 U.S.C. §§ 3503-04, 3506-07, 3509-10 (Supp. II, 1972), but no comparable procedure has been discovered at the state level. *See Project, supra* note 1525, at 1433.

1657. *See* Welfare and Motor Vehicle statutes coded "D" in *Chart*, appendix to this section.

limiting an agency's right to retain records are almost nonexistent, except in the area of arrest and criminal identification.¹⁶⁵⁸

Statutes requiring the expungement of arrest records of persons arrested but not convicted¹⁶⁵⁹ illustrate how some state legislatures have acted to protect the right of privacy where it is unclear that the Constitution requires such protection. The arbitrariness of the criminal record-keeping system, under which a purely fortuitous encounter with the law opens a file that can adversely affect the subject's life regardless of his guilt or innocence,¹⁶⁶⁰ has been the subject of considerable criticism.¹⁶⁶¹ On the other side, law enforcement agencies have legitimate interests in retaining identification information, even about persons acquitted,¹⁶⁶² for such purposes as identifying suspects, victims, and missing persons.¹⁶⁶³ Expungement statutes represent a partial legislative resolution of the conflict between the valid desire of the police to have as much information on hand as possible and the citizen's important interest in not being memorialized in police files. The statutes have been criticized for not going far enough,¹⁶⁶⁴ but they do offer a considerable degree of

1658. As was noted in the discussion of statutory authorization for collection of information, *see* text at notes 1646-49 *supra*, the fact that criminal record-keeping is an end in itself distinguishes it from other areas in which the record is merely a means to performance of another function. This perhaps explains why criminal record-keeping practices have been subject to greater scrutiny. The only statute discovered that addresses retention of other records is NEB. REV. STAT. § 79-4,157 (Supp. 1974), which requires destruction of school disciplinary records three years after the subject leaves school.

1659. *See* Arrest/Crim ID Statutes coded "E" in *Chart*, appendix to this section. *See also* ALAS. STAT. § 12.62.040(3) (1962) (requiring establishment of procedures for the purging of records based on equitable considerations and lapse of time since the subject's last contact with police).

1660. *See, e.g.,* Menard v. Mitchell, 430 F.2d 486, 490-91 (D.C. Cir. 1970), discussed in the text at notes 1910-12 *infra*.

1661. *See, e.g.,* Cohn, "Criminal Records"—A Comparative Approach, 4 GA. J. INT. & COMP. L. 116 (1974); Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850 (1970); Note, *supra* note 1650; Comment, *Police Records of Arrest: A Brief for the Right To Remove Them from Police Files*, 17 ST. LOUIS L.J. 263 (1972).

1662. The term "arrest record" is generally used to describe nonconviction arrest data retained after disposition of the case. Such records include identification data such as fingerprints and photographs, facts surrounding the current arrest and, sometimes, subsequent proceedings. The term does not refer to records leading to conviction, which become true criminal records, or to investigate files, which raise special problems of protecting police investigations and informants. Comment, 38 U. CHI. L. REV., *supra* note 1661, at 852 n.11 (1971). As used in this discussion, "arrest record" includes identification data stored in state criminal identification systems.

1663. Arrest records are also used by police in deciding whether to rearrest or to bring formal charges, by prosecutors in determining the category of offense to be charged and whether plea-bargaining is appropriate, by courts in setting bail and in sentencing, and by parole boards in deciding whether to grant parole. *Id.* at 855.

1664. The major criticisms are that the statutes usually do not apply to local police or identification agencies, they seldom require recall of records disseminated to other agencies, such as the FBI, they rarely contain enforcement provisions, and they place

protection by allowing persons not charged or convicted to demand return or expungement of arrest identification records.¹⁶⁶⁵

The arrest record problem is significant, for according to FBI statistics, several million arrests occur each year that are not followed by a conviction,¹⁶⁶⁶ and in many instances judgments concern-

the burden of seeking return on the subject. *See id.* at 853; Note, *supra* note 1650, at 278; Comment, *Branded: Arrest Records of the Unconvicted*, 44 U. Miss. L.J. 928, 931-34 (1973). *See also* note 1665 *infra*.

1665. Denial of privacy protection to convicted criminals is consistent with the notion of the tort law that those who voluntarily remove themselves from the anonymous mass by, for example, committing a criminal act, have "waived" their right of privacy at least in relation to their criminal conduct. *See* note 1592 *supra* and accompanying text.

Only a few expungement statutes cover the records of persons actually convicted. Alaska, for example, does not give the subject an absolute right to the return of records, but rather requires that procedures be established for removing information from the central system based on consideration of age, the nature of the record, and the interval following the last contact with a law enforcement agency. *See* ALAS. STAT. § 12.62.040 (1962). This statute gives less protection for the innocent subject than most other statutes since expungement is not a matter of right, but it also leaves open the possibility of some protection for the convicted offender. The California statute, CAL. PENAL CODE §§ 1203.4-45 (West Supp. 1975), applies only to convicted felons. It appears, however, to be concerned more with the state's interest in rehabilitation than with the subject's interest in privacy. *See* Comment, *supra* note 1664, at 932.

Among the statutes directed at the records of persons not charged or convicted, there is considerable variation in the scope and extent of the right of expungement. Most of the expungement statutes require the record-subject to request the return of records. *See, e.g.*, MINN. STAT. ANN. § 299C.11 (1964). In Maine, the subject must provide the clerk of court with a list of agencies believed to hold arrest records, and their duty to expunge arises only upon notification of the acquittal. *See* ME. REV. STAT. ANN. tit. 16, § 600 (Supp. 1974). In contrast, MICH. COMP. LAWS § 28.243 (1970) requires automatic return of the record. CONN. GEN. STAT. ANN. § 54-90 (Supp. 1975) provides for automatic erasure upon acquittal, but requires a petition for erasure if the charge is terminated by *nolle prosequi*.

The effect of expungement also varies. Under some statutes the effect is to erase the arrest from the file completely. *See, e.g.*, MICH. COMP. LAWS § 28.243 (1970); CONN. GEN. STAT. ANN. §§ 29-15, 54-90 (Supp. 1975). In Maine the effect of expungement is expressly defined as prohibiting dissemination, restoring civil rights and prohibiting use of the record for impeachment purposes at trial, but apparently the record remains in the files. *See* ME. REV. STAT. ANN. § 600.1 (Supp. 1974). The Missouri statute combines confidentiality and expungement: if a person is not charged within 30 days, the file is required to be closed to all persons except the subject; if there is no conviction within one year following the closing of the record, it is to be expunged. MO. ANN. STAT. § 610.100 (Vernon Supp. 1975). However, if the subject is charged, a subsequent dismissal or acquittal merely closes the record, and does not expunge it. MO. ANN. STAT. § 610.105 (Vernon Supp. 1975).

Finally, some of the statutes exempt certain cases from the expungement provision. *See, e.g.*, MINN. STAT. ANN. § 299C.11 (1964) (no expungement if arrestee was convicted of a felony within past ten years); MICH. COMP. LAWS § 28.243 (1970) (expungement only on court order if arrestee has any prior conviction other than traffic offenses or if charged with a sex offense).

1666. FBI statistics for the nation indicate over 9 million arrests for 1973. Of the adults arrested for FBI Crime Index offenses, less than 62 per cent were convicted of the offense charged or a lesser offense; of the juveniles arrested, about half neither had formal charges preferred against them nor were referred to juvenile authorities. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT 1973, at 30, 34-35 [hereinafter CRIME REPORT].

ing an individual's character are made on the basis of a prior arrest without regard to the disposition of the charge.¹⁶⁶⁷ In the absence of express statutory authorization many courts have been unable to discover any basis in constitutional or tort law for requiring police departments to return or expunge the records of persons who were arrested but not convicted.¹⁶⁶⁸ However, some courts have been persuaded that the maintenance or dissemination of information that would tend to associate the innocent individual with criminal activity places him in a false light, for which, under the common law, injunctive relief is appropriate.¹⁶⁶⁹ Moreover, there are indications that the balance may be shifting in favor of privacy. The growing realization that arrest records are, in practice if not in theory, a serious threat to personal privacy, coupled with developments in the federal constitutional law of privacy,¹⁶⁷⁰ have led at least two state courts to require a showing of compelling need to justify retention of records not leading to conviction.¹⁶⁷¹ But judicial recognition of a broad

1667. Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 MICH. L. REV. — (1975).

1668. As one commentator pointed out, the cases "run the gamut from denying any relief concerning the availability of records of arrests which did not lead to conviction, through the granting of limited relief, to complete expunction . . ." Cohn, *supra* note 1661, at 135. At least one federal circuit court has long recognized expungement of records, including arrest records, as an appropriate remedy when necessary to preserve basic legal rights. *See Sullivan v. Murphy*, 478 F.2d 938, 968 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973).

In *McGovern v. Van Ripen*, 137 N.J. Eq. 24, 43 A.2d 514 (Ch. 1945), the court concluded that the right of privacy was one of the "natural and inalienable rights" secured by the state constitution and approved the federal courts' procedure of granting expungement without express statutory authorization. Until very recently, other state courts have not placed the arrestee's right of privacy on a constitutional footing, and the weight of authority denied the expungement remedy in the absence of a statute mandating such a remedy. *See, e.g., Sterling v. City of Oakland*, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962); *Purdy v. Mulkey*, 228 S.2d 132, 136 (Fla. 1969); *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946), *affd. after retrial*, 225 Ind. 360, 74 N.E.2d 914 (1947), *appeal dismissed*, 333 U.S. 834 (1948).

These cases contrast the strong public interest in effective law enforcement with what was seen as a comparatively weak privacy interest. In *Kolb v. O'Connor*, 14 Ill. App. 2d 81, 87-88, 142 N.E.2d 818, 822 (1957), for example, the court took judicial notice of the fact that the records were not open to the general public. Similarly, it has been suggested that retention of files comprehensible only to responsible officials, such as fingerprint files, present no risk of harm to the subject through improper dissemination, *see State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 377, 66 N.E.2d 755, 760 (1946), and that retention of arrest records is not an invasion of privacy because the file "merely create[s] images of a suspect's physical characteristics." *Walker v. Lamb*, 254 A.2d 265, 267 (Del. Ch. 1969). These rationales are analogous to the publicity and "private facts" requirements of the tort law. *See* notes 1582 & 1587 *supra*.

1669. *See, e.g., State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946). *See also* text at note 1577 *supra*.

1670. *See* text at notes 1789-915 *infra*.

1671. *See Eddy v. Moore*, 5 Wash. App. 334, 487 P.2d 21 (1971); *Davidson v. Dill*, 180 Colo. 123, 503 P.2d 157 (1972). In *Eddy* the court based the record subject's fundamental right of privacy on *Griswold v. Connecticut*, 381 U.S. 479 (1965). The court said that the state's interest in retaining arrest records for future law enforcement

right to the return of arrest records, whether based on constitutional or common-law principles, may be a cumbersome technique for dealing with a complex problem.¹⁶⁷² As the variation among the statutes¹⁶⁷³ indicates, the statutory mechanism for protecting the underlying privacy interests in this situation is more flexible in its ability to accommodate the countervailing public interest in law enforcement, and may therefore be a more desirable resolution of the problem.

Another type of statute dealing with retention of criminal records¹⁶⁷⁴ prohibits the storage of certain information on a centralized system.¹⁶⁷⁵ Like the expungement statutes, these storage statutes postpone dealing with threats to privacy until after information has been collected. However, both types of statutes may influence police behavior at the acquisition stage because the police will be discouraged from acquiring information they cannot keep.¹⁶⁷⁶ It has been suggested that a more effective solution would be to impose direct limi-

purposes was premised on the assumption that a person once arrested might be the subject of police interest in the future. However, when the arrestee is not convicted, there is no justification for the inference, and there is thus no compelling interest in retaining the record. 5 Wash. App. at —, 487 P.2d at 216.

It may well be that *Eddy* and *Davidson* are the breaking edge of the law in this area. The decisions, however, have been criticized for over-extending the right of privacy recognized by the Supreme Court in *Griswold*. See, e.g., Comment, *Constitutional Law—A Right of Privacy in Photographs and Fingerprints*, 17 N.Y.L.F. 1126, 1128-29 (1972). If other courts do not agree that "the right of an individual, absent a compelling showing of necessity by the government, to the return of his fingerprints and photographs, upon an acquittal is a fundamental right implicit in the concept of ordered liberty," *Eddy v. Moore*, 5 Wash. App. 334, —, 487 P.2d 211, 217 (1971), retention would almost certainly be sustained as it has been in the past under a rational relation test.

1672. One court pointed out in refusing to create a nonstatutory expungement remedy,

The magnitude of the task of returning fingerprints and photographs on demand, and making certain that they are returned to the correct person, is a matter for legislative consideration.

.....
If the legislature should come to the conclusion, in general, that there should be delivery of the items, there would still be the matter of possible classification according to the types of offense charged, what demand would be necessary, and other details requiring the particularity of a statute.
Sterling v. City of Oakland, 208 Cal. App. 2d 1, 6-7, 24 Cal. Rptr. 696, 699-700 (1962).

1673. See note 1665 *supra*.

1674. These are statutes dealing with police files other than the mere identification data in arrest records. See note 1662 *supra*.

1675. E.g., ALAS. STAT. § 12.62.020 (1962) provides for the establishment of rules "concerning the specific classes of criminal justice information which may be collected and stored in criminal justice information systems," and provides that information collected under other provisions of law, such as the tax and education titles, shall not be stored on such a system. See also IOWA CODE ANN. §§ 749B.8 (intelligence data shall not be stored in computerized files), 749B.9 (surveillance data shall not be stored in manual or computer files) (Supp. 1974).

1676. See Note, *supra* note 1650, at 1174.

tations on police power to acquire information,¹⁶⁷⁷ but as the retention statutes indicate, the more common judgment apparently is that it is difficult, and perhaps not desirable, to attempt to control police behavior in the field. Controls on retention are a less restrictive constraint on agency information practices and may, in general, be an appealing alternative for legislatures unwilling to limit agency discretion by imposing direct controls on acquisition.

The concern that inaccurate arrest records may harm an innocent person¹⁶⁷⁸ broaches the general problem whether the subject of a government file has a right to monitor its content and to contest its inaccuracies. Inaccuracies will inevitably appear in a government file, and the subject may offer the best assistance in spotting and correcting mistakes or significant omissions.¹⁶⁷⁹ Denying the subject access to the file maintained on him deprives the state of this assistance and harms the subject's privacy interest, not only through the threat that the record portrays the subject in a false light, but also by keeping the subject uncertain about what personal information the government holds and might disclose. Such uncertainty infringes on one's feeling of control over the dissemination of the details of one's individuality.¹⁶⁸⁰ The right of subject access to government files is part of what has been called the privacy right of accuracy control.¹⁶⁸¹

Some state statutes respect this privacy right by providing for subject access to certain records closed to public inspection, such as arrest,¹⁶⁸² welfare,¹⁶⁸³ education,¹⁶⁸⁴ and parole records.¹⁶⁸⁵ In the

1677. See Cohn, *supra* note 1661, at 138. Cohn points out that the practice of opening permanent records immediately upon arrest is unique to this country.

1678. See, e.g., *Davidson v. Dill*, 180 Colo. 123, 503 P.2d 157 (1972); *Eddy v. Moore*, 5 Wash. App. 334, 487 P.2d 211 (1971); note 1660 *supra*.

1679. Karst, *supra* note 1562, at 367-68.

1680. See, e.g., Westin, *Databanks in a Free Society: A Summary of the Project on Computer Databanks*, reprinted in *Joint Hearings*, *supra* note 1641, at 96. The right of access being advocated here is to be distinguished from the due process right to see any records used in connection with a denial of governmental benefits. See, e.g., *Banner v. Smolenski*, 315 F. Supp. 1076 (D. Mass. 1970), which distinguished between a welfare recipient's due process right to see records used at a benefit hearing, and a general right of access to the entire file, which it held Massachusetts law did not provide.

1681. See, e.g., A. MILLER, *supra* note 1503, at 32-37 (focusing on the particular accuracy problems posed by computerized files).

1682. See, e.g., Arrest statutes coded "X" in *Chart*, appendix to this section.

1683. See, e.g., Welfare statutes coded "X" in *Chart*, appendix to this section.

1684. See, e.g., School Records statutes coded "X" in *Chart*, appendix to this section. These statutes generally give the right of access to parents of children under 18, and for purposes of this discussion, parental access is treated as the functional equivalent of subject access.

Statutory treatment of school records will no doubt be significantly affected by the recent federal education amendments, which require subject-access to records of all institutions receiving federal aid. See text at notes 1947-53 *infra*.

1685. See, e.g., Parole statutes coded "X" in *Chart*, appendix to this section.

absence of an express subject access statute in these areas, courts have differed as to whether a requirement of confidentiality bars disclosure to the subject of the record. With respect to welfare records, two New York trial courts have reached contrary results. One court granted subject access, holding that the purpose of confidentiality is to protect the welfare recipient,¹⁶⁸⁶ while the other held that the requirement of confidentiality included the subject, although its holding left open the possibility of examination by the subject upon a showing of special circumstances.¹⁶⁸⁷ A federal district court in Massachusetts concluded that a welfare recipient had no right to inspect those parts of his case record not being used at a hearing on his benefits because welfare records were not "public records" under the state open-records act.¹⁶⁸⁸ But an Oregon court reached a contrary result,¹⁶⁸⁹ distinguishing the Massachusetts decision on the ground that Oregon's welfare records were public records. While welfare records in Oregon were exempted from the open-records requirement by a specific confidentiality statute, reasoned the court,¹⁶⁹⁰ the exemption should be strictly construed in light of the general policy favoring disclosure: Because the purpose of the confidentiality statute was to protect the privacy of the recipients, they did not fall within the class of persons to whom disclosure was forbidden.¹⁶⁹¹ Absent statutory guidance, other courts have upheld the parental right to inspect school records¹⁶⁹² and have denied prisoners' claims to inspect parole records.¹⁶⁹³ While many of these decisions have thus permitted disclosure, it is of significance that the decisions turn on the general right of access to a closed file; none has recognized a privacy interest in subject access to government files.

1686. See *In re Mellion*, 58 Misc. 2d 441, 295 N.Y.S.2d 822 (Sup. Ct. 1968).

1687. See *Turner v. Barbaro*, 56 Misc. 2d 53, 287 N.Y.S.2d 542 (Sup. Ct. 1967). The court gave no indication of what those special circumstances might be.

1688. See *Banner v. Smolenski*, 315 F. Supp. 1076 (D. Mass. 1970). *Accord*, Tex. Atty. Gen. Op. No. H-249 (March 1, 1974).

1689. See *Stivahtis v. Juras*, 13 Ore. App. 579, 511 P.2d 421 (1973).

1690. See 13 Ore. App. at —, 511 P.2d at 426.

1691. 13 Ore. App. at —, 511 P.2d at 426.

1692. See, e.g., *Van Allen v. McCleary*, 27 Misc. 2d 81, 211 N.Y.S.2d 501 (1961). See Comment, *Parental Right To Inspect School Records*, 20 BUFFALO L. REV. 255 (1970). However, the general practice of school officials is still to deny parents and pupils access to school records. Indeed one survey concluded that "parents and pupils are more often denied access to school records than any other category of potential users." Goslin & Bordier, *supra* note 1640, at 56.

1693. See, e.g., *Application of Mailler*, 174 N.Y.S.2d 59 (County Ct. 1958). See Tex. Atty. Gen. Open Records Dec. No. 11 (Nov. 23, 1973). But see *Taylor v. State*, 27 Misc. 2d 719, 215 N.Y.S.2d 798 (Ct. Cl. 1961) (holding that the confidentiality statute did not preclude inspection of decedent's prison and hospital records when his administratrix waived the doctor-patient privilege and no third parties were involved in the records).

Statutes making certain records confidential for the purpose of protecting the subject's privacy clearly should not be construed to defeat this fledgling privacy interest in subject access. Where the purpose of a confidentiality statute is to safeguard state interests, such as the sources of information or candidness of bureaucratic opinion, these interests should be taken into account. They should be weighed, however, against the privacy interest in subject access rather than against the more general interest in public access. Often state interests will be paramount. A legislature or court may legitimately conclude that a prisoner should not have access to his parole records after engaging in a balancing of the government's specific interest in nondisclosure to the subject¹⁶⁹⁴ against the subject's privacy right. A similar balancing process could lead to the conclusion that an individual does not have a right to examine his police records in the absence of express statutory permission:¹⁶⁹⁵ even commentators who support a broad right of privacy have not suggested that the right of subject access in this area should go beyond the ordinary rules of criminal discovery. As one commentator has stated, "[i]t is true that some inaccuracies will be cleared up by the subject, but the risk of compromising investigative leads and the identity of useful informers outweighs the subject's interest in the statements in the file made by witnesses who testify against him."¹⁶⁹⁶

Some statutes that grant subject access, particularly in the area of education records, also attempt to accommodate the state interest in nondisclosure. For example, an Oregon statute opening education files addresses the concern that nonprofessionals are unable to interpret evaluative files by requiring that "behavioral" records be open to inspection only in the presence of a person qualified to interpret them.¹⁶⁹⁷ The Delaware statute attempts to mitigate the chilling effect that disclosure to students or parents might have on expressions of professional opinion by eliminating tort suits against teachers based on their remarks in evaluative files.¹⁶⁹⁸ Similarly, several state statutes dealing with parole records attempt to accommodate the conflicting individual and governmental interests by granting the

1694. The concern of police that opening their investigative files will have a chilling effect on informants and subject informants to physical danger applies more to the subject of the file than to any other person. *Cf. Langert v. Tenney*, 5 App. Div. 2d 586, 588-89, 173 N.Y.S.2d 665, 667 (1958), *appeal dismissed*, 5 N.Y.2d 875, 155 N.E.2d 870, 182 N.Y.S.2d 25 (1959).

1695. *See, e.g., State v. Mattio*, 212 La. 283, 298, 31 S.2d 801, 805, *cert. denied*, 332 U.S. 818 (1947); *State v. Dallao*, 187 La. 391, 439, 175 S. 4, 20 (1937) (both dismissing the defendant's claim to inspect his own arrest records and police reports on the ground that such records were closed to public inspection).

1696. Karst, *supra* note 1562, at 368 & n.119, *citing Jencks v. United States*, 353 U.S. 657 (1957).

1697. *See ORE. REV. STAT. § 336.195* (1975).

1698. *See DEL. CODE ANN. tit. 14, § 4111* (1974).

parole board discretion to disclose when it would be in the best interests of the prisoner.¹⁶⁹⁹ This scheme has the drawback that an interested party—the parole board—makes the determination whether to allow disclosure. The statute clearly aids the subject seeking access in any legal dispute, however, by expressly recognizing the validity of the underlying privacy interest and by providing a standard, however minimal, by which a court could determine whether disclosure is appropriate.

The second half of the privacy right of accuracy control, complementing the right of subject access, is the right to require that inaccurate or incomplete records be corrected. One court, in a jurisdiction without a specific statutory remedy, held that a state bureau of criminal identification was under “no duty to change or alter its records on the basis of the unsubstantiated word of the concerned individual,”¹⁷⁰⁰ thereby implying that the state also had no duty to investigate a subject’s claim. A rigorous dissent, however, argued that courts must provide a remedy in such cases:

[Today,] vast repositories of personal information may easily be assembled into millions of dossiers characteristic of a police state. Our age is one of shriveled privacy. Leaky statutes imperfectly guard a small portion of these monumental revelations. Appellate courts should think twice, should locate a balance between public need and private rights, before deciding that custodians of sensitive personal files may with impunity refuse to investigate claims of mistaken identity or other error which threaten the subject with undeserved loss.¹⁷⁰¹

Some state legislatures have agreed that the subject of an arrest record must have an opportunity to contest the accuracy of the record.¹⁷⁰² With regard to other records, however, legislatures have

1699. See MO. ANN. STAT. § 549.285 (Supp. 1975); MONT. REV. CODES ANN. § 95-3206 (Supp. 1974); N.M. STAT. ANN. § 41-17-18 (1953); N.D. CENT. CODE § 12-59-01 (Supp. 1973).

1700. *White v. State*, 17 Cal. App. 3d 621, 630, 95 Cal. Rptr. 175, 181 (1971). The case presented a classic, or, in the words of the dissent, “Kafkaesque,” horror study of arrest record inaccuracy. See 17 Cal. App. 3d at 634, 95 Cal. Rptr. at 184 (Friedman, J., dissenting). Plaintiff had a record dating from a “youthful scrape of the joyriding variety” in 1939. 17 Cal. App. 3d at 632, 95 Cal. Rptr. at 183. In 1941 he was erroneously identified from his mug shot as a check forger, and the charge was entered on his record. “During the following years the erroneous forgery entry on this record at the Bureau caused rejection of applications for employment as a policeman and the actual loss of one police job. Eventually he discovered the cause of these rejections and in 1967 went to the Bureau . . . requesting correction.” 17 Cal. App. 3d at 633, 95 Cal. Rptr. at 183. During the course of his efforts to have the file corrected, the plaintiff was apparently allowed to see it, but there is no intimation in the majority opinion that the state bureau was under a duty to permit this.

1701. *White v. State*, 17 Cal. App. 3d 621, 631, 95 Cal. Rptr. 175, 181-82 (1971).

1702. See, e.g., IOWA CODE ANN. § 749B.5 (Supp. 1974); ALAS. STAT. § 12.62.030(c) (1974).

not granted subjects such an opportunity. It may be true that the potential for harm is greatest where inaccurate arrest records are involved, but inaccuracies in other records can be equally damaging to the individual. The government interest in denying record subjects a right of challenge is essentially financial and not insignificant if such a right brought large numbers of requests for inspection and correction. Because much of the financial and psychological damage caused by government information-handling is a consequence of inaccurate records, however, the over-all privacy concern could be reduced by according subjects a right of challenge. Moreover, such a right provides subjects significant privacy protection without disturbing current acquisition, retention, and dissemination patterns. In areas where requiring an agency to investigate subject allegations of error would be too costly, an alternative might lie in allowing subject access and granting the subject an opportunity to prove inaccuracies.

With the exception of the few expungement and subject access statutes, statutory protection of privacy is largely limited to the final stage of the information-handling process—dissemination. The dissemination problem has undoubtedly received greater attention than the earlier stages of the process because it is more readily seen as a threat to individual privacy. Nevertheless, as an earlier study has concluded, the state laws governing dissemination hardly constitute a well-planned program of privacy protection.¹⁷⁰³ A major failing that undercuts the effectiveness of the scattered statutes regulating dissemination is the general absence of provisions for notification of the subject when the agency receives a request involving his file.¹⁷⁰⁴ If a subject does happen to learn of the proposed dissemination in time, he clearly has standing to object.¹⁷⁰⁵ However, in most contexts the subject does not learn of the request unless notified, and the subject's privacy interest is thus left in the hands of the record keeper.

State open-records acts that exempt information the disclosure of which would constitute an unwarranted invasion of privacy¹⁷⁰⁶ give the record keeper at least the right to raise the subject's privacy

1703. Project, *supra* note 1525, at 1438.

1704. See, e.g., Tex. Atty. Gen. Op. No. H-90, at 8 (Aug. 29, 1973).

1705. For example, in *Zimmerman v. Wilson*, 81 F.2d 847 (3d Cir. 1936), the depositor was said to have standing to restrain a search of his bank record by the IRS, the court noting that to deny standing on the ground that the records were the bank's property ignored substance for form, since the bank had no interest in contesting the search.

1706. See notes 1218-19 *supra* and accompanying text. In addition to statutes containing a specific exemption for invasion of privacy, some statutes exempt records made confidential by law, including judicial decisions, see, e.g., TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(1) (Supp. 1974), and thus may include the common-law right of privacy.

interest to resist dissemination. However, it is often unclear whether such provisions impose a duty on the record keeper to protect the privacy rights of record subjects.¹⁷⁰⁷ It seems doubtful that agencies can adequately defend so personal a right as privacy, for in the absence of the threatened party, the decision can be based only on a rigid and formalistic conception of the privacy interest.¹⁷⁰⁸ Statutes requiring that specific records be kept confidential afford a more certain protection against disclosure since they limit the record keeper's discretion to disseminate information. Often, however, the subject's privacy interest will be receiving an indirect benefit from statutes primarily designed to protect the government's interests in nondisclosure.

The pattern of statutory protection of welfare records is unique because federal law requires as a condition of participation in the federally funded assistance programs that states "take steps to restrict use or disclosure of information to purposes directly connected with the administration of assistance."¹⁷⁰⁹ The majority of states comply with the federal requirement via statutes making confidential all records kept in connection with federally funded assistance programs.¹⁷¹⁰ The federal requirement protects these records not only against disclosure to the public, but also against use by the state for other purposes.¹⁷¹¹ Federal law expressly permits the states to make

1707. Exemptions from open-records laws are generally said to be permissive rather than mandatory. *See* note 1216 *supra*. *Cf.* text at notes 1141-51 *supra*. Three states, however, distinguish between permissive and mandatory exemptions: included in the first category are exemptions that protect governmental interests, such as that for investigatory files and interagency memoranda, while the second category contains exemptions aimed at the record subject's privacy interest, such as medical, welfare, and school records. *See* COLO. REV. STAT. ANN. § 24-72-204 (1973); MD. ANN. CODE art. 76A, § 3 (Supp. 1974); WYO. STAT. ANN. § 9-692.3 (Supp. 1973). The Texas statute also makes clear that "confidential" information shall not be disseminated, and provides civil and criminal sanctions for wrongful dissemination. TEX. REV. CIV. STAT. ANN. art. 6252-17(a), § 10 (Supp. 1974). The Texas Attorney General concluded that while public disclosure "must never violate a right of privacy or confidentiality," agencies could continue to disclose information exempted by the Act if such a right was not violated. *See* Tex. Atty. Gen. Open Records Dec. No. 18A, at 10 (March 25, 1974).

1708. *See, e.g.*, Tex. Atty. Gen. Open Records Dec. No. 2 (Sept. 10, 1973), applying Prosser's formula, *see* text at note 1577 *supra*, to determine whether certain records of the Department of Public Welfare must be disclosed.

1709. 42 U.S.C. § 602(a)(9) (1970).

1710. *See* Welfare statutes coded "H" and "J" in *Chart*, appendix to this section. A few of these states, however, run general assistance programs, which are not subject to the federal requirements. *See, e.g.*, CAL. WELF. & INSTNS. CODE § 17006 (West 1972); COLO. REV. STAT. ANN. §§ 30-11-101 to -104 (1973).

1711. For example, the California Attorney General concluded that such records could not be disclosed to the county tax assessor to confirm eligibility for a specific homeowner's exemption even though it was the only reasonable means of administering the exemption. 55 CAL. OP. ATTY. GEN. 74, 78 (1972). As well as making case records confidential, the California statute prohibits disclosure of names of recipients. *See* CAL. WELF. & INSTNS. CODE § 10850 (West 1972). The California legislature could, consistent with federal law, permit disclosure of names. *See* notes 1712 & 1713 *infra*. The California Attorney General suggested such an amendment as a solution to the particular problem presented. *See* 55 CAL. OP. ATTY. GEN. 79.

public the names, addresses, and amounts paid to recipients as long as such information is not used for political or commercial purposes.¹⁷¹² Most states have taken advantage of this provision and have expressly authorized the publication of such lists,¹⁷¹³ but several continue to protect the identity of recipients from public disclosure.¹⁷¹⁴

These variations in the protection afforded welfare records reflect differing conceptions of the welfare recipient's right of privacy. The general confidentiality of case record information required by federal law seems to protect a zone of privacy similar to that recognized by the common law.¹⁷¹⁵ Such records include information relating to family life, health, finances, and other matters that fall within the usual conceptions of "private facts." The zone of privacy protected by the federal requirements goes beyond the zone protected by the tort law in that it covers caseworker narratives evaluating such information.¹⁷¹⁶ Those state statutes that protect the identity of recipients, on the other hand, could be viewed as either recognizing a general interest in anonymity, or recognizing that the receipt of assistance is itself a private or embarrassing fact that falls within the zone of privacy. Tort law concepts also influence the way in which the open-records acts' requirement of full government disclosure interact with the welfare requirements of confidentiality. For example, one state attorney general applying an open-records act found that information relating to legitimacy, family life, and the emotional adjustment of the subjects was within the zone of privacy and hence nondisclosable.¹⁷¹⁷ However, he concluded, "basic" information such as the identity of the recipients and of the programs under which they received benefits was not within the exemption and could therefore be entered on an inter-agency information-sharing system.¹⁷¹⁸

Records of adoption are the only other records made confidential

1712. Revenue Act of 1951, Pub. L. No. 82-183, ch. 521, § 618, 65 Stat. 569, provided that, "[n]o state . . . shall be deprived [of any payments due under 42 U.S.C. §§ 601-606] by reason of the enactment . . . of any legislation prescribing any conditions under which public access may be had to records of the disbursement of any such funds . . . , if such legislation prohibits the use of any list or names obtained through such access to such records for commercial or political purposes."

1713. See Welfare statutes coded "J" or "P" in *Chart*, appendix to this section. In Pennsylvania, however, the statute has been construed to allow disclosure of addresses and amounts of assistance only when a particular name is provided, but not to allow or compel disclosure of a general list of recipients. See *McMullan v. Wohlgemuth*, 453 Pa. 147, 308 A.2d 888 (1973), *appeal dismissed*, 415 U.S. 970 (1974).

1714. See Welfare statutes coded "H" in *Chart*, appendix to this section.

1715. See text at note 1577 *supra*.

1716. Zimmerman, *supra* note 1637, at 325.

1717. See Tex. Op. Atty. Gen. No. H-90 (Aug. 29, 1973); Tex. Atty. Gen. Open Records Dec. No. 2 (Sep. 10, 1973); Tex. Atty. Gen. Open Records Dec. No. 9 (Nov. 12, 1973).

1718. See Tex. Op. Atty. Gen. No. H-287 (April 29, 1974). Texas law does not provide for publication of lists of welfare recipients.

by statute in almost all of the states.¹⁷¹⁹ Like case history information protected by the welfare statutes, adoption records deal with matters of family life that might be considered private under tort law.¹⁷²⁰ Additional privacy protection arises from the fact that in many jurisdictions the sealing of such records is a final step in the process of legitimating the new family and rendering it legally indistinguishable from a natural family. By contrast, the records arising out of the state's licensing functions are generally not protected by statute. For example, driver's license records are expressly open to public inspection in the majority of states.¹⁷²¹ However, physical and mental health information, such as the results of vision tests, is commonly confidential in accordance with the traditional view that matters of personal health are entitled to be private.¹⁷²²

Several states authorize the sale of automobile licensing information for commercial purposes.¹⁷²³ In *Lamont v. Commissioner of Motor Vehicles*,¹⁷²⁴ a three-judge federal district court upheld this practice against the claim that it constituted an unconstitutional invasion of privacy. The court found that because the information was not vital or intimate and was contained in a public record available to anyone on demand, the state was perfectly justified in providing a packaging service for commercial users in order to generate additional revenues.¹⁷²⁵ This practice of selling mailing lists is insensitive to the individual's interest in controlling the flow of information about his identity. Because the licensing records are public, this interest is already little protected, but the sale to commercial organizations involves the additional harm of subjecting the licensee

1719. See Adoption statutes coded "C" in *Chart*, appendix to this section.

1720. See also Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670 (1973) (identifying matters of family life as one of the areas afforded broad constitutional protection); text at notes 1898-900 *infra*.

1721. See Motor Vehicle statutes coded "P" in *Chart*, appendix to this section. It should be noted in addition that motor vehicle records required to be kept by law will be disclosable under an applicable open-records statute even when not expressly made public.

1722. See, e.g., CAL. VEHICLE CODE § 1808.5 (West 1971); N.C. GEN. STAT. § 20-27 (Supp. 1974). In states that have open-records laws such provisions pose substantial administrative difficulties, since a method must be devised for providing public access to the records while protecting part of the contents. See, e.g., *State ex rel. Patterson v. Ayers*, 171 Ohio St. 368, 171 N.E.2d 508 (1960); 55 CAL. OP. ATTY. GEN. 122 (1972).

1723. See, e.g., CAL. VEHICLE CODE § 1810 (West 1971); FLA. STAT. ANN. § 319.25 (5)(a) (1968); IND. ANN. STAT. CODE § 9-1-1-8 (Burns 1973); N.M. STAT. ANN. § 64-2-8 (1972); N.Y. VEH. & TRAF. LAW § 202(3) (McKinney Supp. 1974); N.C. GEN. STAT. § 20-26 (Supp. 1974); OHIO REV. CODE ANN. § 4053.26 (Page 1973); PA. STAT. ANN. tit. 75, § 417 (1971); S.C. CODE ANN. § 46-120 (1962); TENN. CODE ANN. § 59-711 (1968); UTAH CODE ANN. § 41-2-12.1 (1953); VA. CODE ANN. § 46.1-32 (1974).

1724. 269 F. Supp. 880 (S.D.N.Y.), *affd. per curiam*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968).

1725. 269 F. Supp. at 883-84.

to unsolicited commercial contacts. While an individual's interest in avoiding such contacts is not at the core of the privacy interest and thus is not worthy of constitutional (or perhaps even common-law) protection, the state's interest in generating rather small amounts of revenue is not compelling either. This is an area in which legislatures should exercise self-restraint, and strike a balance that is more respectful of individual privacy interests.

At least half of the states make some tax records confidential,¹⁷²⁶ with income tax returns more commonly protected than property tax returns.¹⁷²⁷ It has been said that the purpose of such statutes is to assure the taxpayer that information supplied will be used only for the purposes of computing and enforcing his tax obligation,¹⁷²⁸ thereby furthering the state interest in encouraging taxpayers to make complete and honest disclosure of needed information¹⁷²⁹ and only consequentially protecting the taxpayer's privacy interests. Such protection ceases when a different paramount state interest is furthered by disclosure. For example, all such statutes authorize exchange of relevant information with agencies of other tax-collecting authorities and to law enforcement officials in connection with prosecution for tax offenses,¹⁷³⁰ and a few authorize broader dissemination for other governmental purposes.¹⁷³¹

Courts in general have narrowly construed the privacy protection afforded by tax statutes, and subjected tax information to public disclosure in the absence of express statutory protection.¹⁷³² Thus in *Gallagher v. Boller*,¹⁷³³ the court refused to infer from the statutory protection of mandatory property statements a legislative intention to make documents relating to tax exemptions confidential as well. The court found that the voluntary nature of the application for exemption was a reasonable explanation for its omission from the

¹⁷²⁶ See Tax statutes coded "C" in *Chart*, appendix to this section.

¹⁷²⁷ For example, compare IND. ANN. STAT. CODE § 6-3-6-8 (Burns 1973) (income tax), with § 6-1-39-2 (Burns 1973) (property tax); MD. ANN. CODE art. 81, § 300 (1957) (income tax), and art. 81, § 45(b) (1957) (personal property tax), with art. 81, § 45(a) (1957) (real property tax); N.H. REV. STAT. ANN. § 77:19 (1970), *as amended*, § 544:8 (Supp. 1973) (income tax), with § 76:7 (1970), *as amended*, § 544:8 (Supp. 1973) (property tax).

¹⁷²⁸ See *In re Department of Taxation & Fin.*, 1939 N.Y. OP. ATTY. GEN. 207.

¹⁷²⁹ *Webb v. Standard Oil Co.*, 49 Cal. 2d 509, 319 P.2d 621 (1957).

¹⁷³⁰ See Tax statutes coded "C" in *Chart*, appendix to this section.

¹⁷³¹ See, e.g., MICH. COMP. LAWS ANN. § 206.466 (Supp. 1974) (authorizing disclosure to any state officer when required for efficient administration of the laws).

¹⁷³² See, e.g., *National Standard Life Ins. Co. v. Permenter*, 195 S.2d 603 (Fla. App. 1967); Tex. Atty. Gen. Letter Advisory No. 76 (Jan. 11, 1974). Courts have disagreed on whether statutory confidentiality renders the substance of the record privileged, and thus permits the taxpayer to refuse to produce his copies of tax returns, see *Webb v. Standard Oil Co.*, 49 Cal. 2d 509, 319 P.2d 621 (1957), or whether it merely regulates the behavior of the officials who maintain the government's copies. See *Application of Second Additional Grand Jury*, 234 N.Y.S. 2d 64 (Sup. Ct. 1962).

¹⁷³³ 231 Cal. App. 2d 482, 41 Cal. Rptr. 880 (1964).

statutory protection.¹⁷³⁴ Similarly, one court held that a requester under a state open-records act was entitled to copy the computer tapes of property tax appraiser reports.¹⁷³⁵ The court noted that most of the information on the tapes could be obtained from visual inspections of the property and thus found "nothing in the information here that would qualify as an invasion of privacy."¹⁷³⁶ Although this requester was an individual engaged in noncommercial research, the decision again leaves the door open to abuse of the state powers of data collection by institutional commercial users who might well disseminate information more broadly. Thus, the decision reflects a lack of sensitivity to the problems posed by the dissemination of data produced by the government's unique capacity for collection and collation.

While a few states deal with the confidentiality of education records by statute (generally mandating confidentiality¹⁷³⁷), most have delegated responsibility for school records to the local school districts.¹⁷³⁸ Either technique can be relatively effective in achieving an equilibrium of competing interests: school boards may unduly favor teacher and administrator demands for privacy at the expense of countervailing interests supporting disclosure to, for example, students and parents, but local regulations can be more detailed, more flexible, and more responsive to local needs. The practices of

1734. 231 Cal. App. 2d at 491, 41 Cal. Rptr. at 886.

1735. See *Mense v. City of Manchester*, 113 N.H. 533, 311 A.2d 116 (1973).

1736. 113 N.H. at —, 311 A.2d at 119.

1737. See Education statutes coded "C" in *Chart*, appendix to this section. In addition, several states exempt scholastic records from disclosure under open-records acts. See, e.g., ARK. STAT. ANN. § 12-2804 (1968); IOWA CODE ANN. § 68A.7 (1973); MD. ANN. CODE art. 76A, § 3(c) (Supp. 1974); N.M. STAT. ANN. § 71-51-1 (1961), as amended, (Supp. 1973); S.C. CODE ANN. § 1-20.1 (Supp. 1974); TENN. CODE ANN. § 15-305 (1973), as amended (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(14) (Supp. 1974); VA. CODE ANN. § 2.1-342(b)(3) (Supp. 1974); WASH. REV. CODE § 42.17.310(a) (1974); WYO. STAT. ANN. § 9-692.3(d) (Supp. 1973). In Maryland and Wyoming it is clear that the exemption for these records is mandatory. See note 1707 *supra*. The National Committee for Citizens in Education advocated specific statewide standards for school record-keeping practices. See *Joint Hearings*, *supra* note 1641, at 195-96 (statement of S. Salett).

1738. Goslin & Bordier, *supra* note 1640, at 43.

At least one state has accommodated the interest in local control by expressing the policy of confidentiality in a state statute while granting local districts rule-making authority to implement the policy. See ORE. REV. STAT. § 336.195 (1975). Under § 336.205, any records designated as confidential under the authority of that section "shall not be deemed a public record for purposes of ORS 192.005," the open-records act. This approach has the disadvantage, however, of allowing local districts to continue to disclose records to employers and others.

In contrast with the discretionary treatment of elementary and secondary records, the Oregon statute dealing with community college records specifically withholds from public inspection, absent consent of the subject, evaluative information including grades, the results of psychometric tests, disciplinary action, and "other personal matters." ORE. REV. STAT. § 341.290(19) (1975).

school districts in the absence of statutory direction vary,¹⁷³⁹ although a common pattern is to disseminate records to police, prospective employers and a few others, but not to students or to the public in general.¹⁷⁴⁰ Often a local policy conflicts with state law or policy. One instance of conflict arose when the New York City Board of Education prohibited the dissemination of names and addresses to private investigators and commercial interests seeking to trace families through the medium of school records.¹⁷⁴¹ In weighing this local New York rule against the common-law right to inspect public records, one court concluded that the right to inspect in connection with the preparation of a criminal defense was overriding, but noted that the rule would have been given effect had the requester's interest in dissemination not been so great.¹⁷⁴² It seems that a local rule of confidentiality would not override a state statutory requirement of disclosure. Thus, the privacy interests of students and teachers is most threatened by state open-records acts that require disclosure of records unless specifically exempted, without inquiry into the motives of the requester.¹⁷⁴³ Under such acts there is little chance that the needed balancing of interests will occur. The decision under the Texas open-records act that a state university must disclose the names and addresses of entering freshmen to the proprietor of a local bookstore,¹⁷⁴⁴ for example, stands in marked contrast with the careful balancing of interests in the New York decision.

In all of the foregoing areas, present confidentiality statutes deal primarily with protecting personal privacy interests. In the area of law enforcement activities, however, the dominant impetus for confi-

1739. Goslin & Bordier, *supra* note 1640, at 56.

1740. *Id.* A survey of state and local practices with respect to school records concluded that, while parents and children are most often denied access to school records, "[t]hese same records . . . are available to a broad variety of local, state, and federal agencies as well as to such private organizations as banks, employers and even credit bureaus." *Joint Hearings*, *supra* note 1641, at 193 (statement of S. Salett, Senior Associate, National Committee for Citizens in Education).

1741. *See* Marmo v. Board of Educ., 56 Misc. 2d 517, 517-18, 289 N.Y.S.2d 51, 52 (Sup. Ct. 1968), *citing* the Board's Manual of School Office Procedures and Practices.

1742. *See* Marmo v. Board of Educ., 56 Misc. 2d 517, 519, 289 N.Y.S.2d 51, 53 (Sup. Ct. 1968).

1743. *See* statutes cited in note 1242 *supra*.

1744. Tex. Atty. Gen. Open Records Dec. No. 16 (Jan. 14, 1974). The opinion concluded that although the act exempts "student records at educational institutions," TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(14) (Supp. 1974), the exemption did not apply to students' names and addresses. Tex. Atty. Gen. Open Records Dec. No. 16, at 1. Since the Texas act has an exemption based on the subject's right of privacy, *see* note 1569 *supra*, the decision also indicates that that right is not construed as protecting one's name and address from unauthorized disclosure to commercial interests. Finally, this result points up the weakness of open-records act exemptions as a means of protecting privacy, since such exemptions are usually strictly construed in light of the policy favoring disclosure. *See, e.g.*, 36 ORE. OP. ATTY. GEN. 543, 543-44.

dentiality has been a number of important governmental interests. For example, many states make parole and probation records confidential,¹⁷⁴⁵ but most such statutes have been construed as protecting agency information sources rather than the privacy of the parolee or probationer.¹⁷⁴⁶ Similarly, records of law enforcement agencies are almost universally exempted from disclosure under open-records laws, thus protecting the government's need for secrecy in this area.¹⁷⁴⁷ A few states have separate statutes making arrest and criminal identification records confidential,¹⁷⁴⁸ but the statutes also generally protect state rather than individual interests. The Maine statute, for example, permits disclosure of arrest and criminal identification information even on pending cases as long as disclosure would not jeopardize investigation or prosecution.¹⁷⁴⁹ Moreover, at least one commentator has alleged that arrest information can be obtained even where statutes prohibit its dissemination.¹⁷⁵⁰ Only a few criminal record statutes provide significant protections for the individual's right of privacy by not only limiting dissemination to certain named officials but by providing civil and criminal sanctions for wrongful disclosure.¹⁷⁵¹ Even these statutes, however, do not attempt to control all law enforcement units.¹⁷⁵²

1745. See Parole statutes coded "C" in *Chart*, appendix to this section.

1746. See, e.g., *Jordan v. Loos*, 204 Misc. 814, 125 N.Y.S.2d 447 (1953); Application of Mailler, 174 N.Y.S.2d 59 (County Ct. 1958). Some statutes, however, seem to be at least somewhat concerned with the subject's privacy interest, since they permit disclosure when it would be in the best interests of the defendant. See statutes cited in note 1699 *supra*.

1747. See note 1223 *supra* and accompanying text. See also Comment, 38 U. CHI. L. REV. 850 (1970), *supra* note 1661, at 862. One attorney general has construed such an exemption as applying only to investigatory information and internal files: "the name, age, address, offense and disposition in each arrest, should be extracted from the more detailed offense reports" and disclosed under the open-records act. Tex. Atty. Gen. Open Records Dec. No. 18A, at 10 (March 25, 1974).

1748. Such statutes generally apply only to information in the hands of state bureaus of criminal identification. See Arrest/Crim. ID statutes coded "C" in *Chart*, appendix to this section.

1749. ME. REV. STAT. ANN. tit. 25, § 1631 (1964). It also makes available any information revealed in open court, which seems to reflect the traditional tort notion that once information is made public it cannot normally recapture the elusive quality of privateness. See note 1587 *supra* and accompanying text.

1750. See Note, *supra* note 1650, at 1163. Limiting the dissemination of all criminal records, particularly to prospective employers, assists the convicted offender in starting a new life without the stigma and handicaps of his criminal record, see, e.g., Comment, *supra* note 1525, at 660, and protects the innocent from the dangers of inaccuracy and misrepresentation inherent in a centralized record-keeping system.

1751. See, e.g., IOWA CODE ANN. §§ 749B.2 (limiting dissemination to criminal justice agencies and requiring that a list be kept of persons to whom data is disseminated), 749B.6 (civil remedy), 749B.7 (criminal sanctions) (Supp. 1974); ALAS. STAT. §§ 12.62.030 (a) (limiting dissemination), 12.62.060 (civil and criminal remedies) (1962).

1752. The dissemination provision of the Iowa statute applies only to the state bureau. See IOWA CODE ANN. §§ 749B.2, .13 (Supp. 1974). The Alaska statute applies to criminal justice information systems funded by the Law Enforcement Assistance Administration. See ALAS. STAT. § 12.62.070(1) (1962).

States have given even less statutory attention to providing remedies for individuals harmed by dissemination of government-held information than they have to controlling that process. Some states have statutes that create a private right of action for harm done by official violations in general¹⁷⁵³ or for wrongful disclosure of certain confidential information.¹⁷⁵⁴ Most state confidentiality statutes, however, provide either criminal sanctions¹⁷⁵⁵ or no sanctions at all.¹⁷⁵⁶ Tort law protects against republication by nonofficials of information made confidential by law,¹⁷⁵⁷ but does not provide a remedy against officials because of the doctrine of governmental immunity.¹⁷⁵⁸ However, courts may in the absence of an express statutory remedy imply a cause of action against a government official for violation of a statutory duty to hold records confidential. A New York court, for example, held that a former inmate of a state mental hospital had a cause of action against the director for unlawful disclosure of case record information.¹⁷⁵⁹

Professor Bloustein has suggested that statutes protecting the

1753. See, e.g., KY. REV. STAT. ANN. § 446.070 (1972) ("A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation . . ."). A line of cases applying this provision to disclosure of tax information in violation of a confidentiality statute made clear that the statute created a cause of action only against those officials who fell within the statutory prohibition. Thus a city commissioner who allowed the plaintiff's tax return to be spread upon the public records of the Commission was liable, see *Maysville Transit Co. v. Ort*, 296 Ky. 524, 177 S.W.2d 369 (1943); but a member of a mayor's advisory committee, see *Tomlin v. Taylor*, 290 Ky. 619, 162 S.W.2d 210 (1942), and the newspaper that republished the information, see *Maysville Transit Co. v. Taylor*, 296 Ky. 527, 177 S.W.2d 371 (1943), were not.

1754. See, e.g., IOWA CODE ANN. § 749B.6 (Supp. 1974); ALAS. STAT. § 12.62.060 (1962) (arrest records).

1755. See all statutes code "S" in *Chart*, appendix to this section.

1756. See, e.g., CAL. REV. & TAX CODE § 451 (West 1971).

1757. For example, a Florida court was willing to imply a cause of action against a newspaper for publication of a court docket entry of plaintiff's voluntary narcotic commitment proceedings under a statute making such records confidential. See *Patterson v. Tribune Co.*, 146 S.2d 623 (Fla. App. 1962). But cf. note 1587 *supra*. Prosser believes that publication of a confidential record is actionable. See Prosser, *supra* note 1564, at 395-96. A Colorado court, however, expressed doubt, in dictum, that the statute making welfare records confidential created any rights in the recipient. See *Lincoln v. Denver Post*, 31 Colo. App. 283, —, 501 P.2d 152, 153 (1972). The court held that if the recipient had any right of privacy in her welfare records, it was lost when she was indicted for welfare fraud. 31 Colo. App. at —, 501 P.2d at 154.

1758. See note 1568 *supra*.

1759. See *Munzer v. Blaisdell*, 183 Misc. 773, 49 N.Y.S.2d 915 (Sup. Ct. 1944), *affd.*, 269 App. Div. 970, 58 N.Y.S.2d 359 (1945). The court applied the general rule that "where a positive duty is imposed by statute, a breach of that duty will give rise to a cause of action for damages on the part of the person for whose benefit the duty was imposed; and, in such cases, if the statute itself does not provide a remedy, the common law will furnish it." 183 Misc. at 775, 49 N.Y.S.2d at 917 (emphasis added). Thus, this principle is applicable only if the confidentiality statute is interpreted to protect the privacy interest of the subject, rather than the government's interest in nondisclosure.

confidentiality of certain government-held information arise from the same concern for spiritual privacy or inviolate personality that, in his view, has motivated the development of the tort law.¹⁷⁶⁰ It could be argued that the parallels between the common law and the confidentiality statutes reflect instead a common limitation on the privacy concept. Thus, while it appears that not all such statutes are aimed at protecting the subject's right of privacy—indeed, some conflict with that right by denying the subject access to his own file¹⁷⁶¹—the “zones of privacy” created by the statutes do seem to be similar to the “private facts” requirement of the tort law. Intimate details of birth or family,¹⁷⁶² indigency,¹⁷⁶³ and health or mental health information¹⁷⁶⁴ are all matters that fall within the tort standard of facts objectionable to a reasonable person. In contrast, the nonconfidentiality of driver's license records,¹⁷⁶⁵ which contain fairly innocuous information, reflects the tort law's apparent failure to protect a general right of selective disclosure. Statutes that seem to go beyond the tort law, such as those dealing with tax records, are generally explainable in terms of the state's interests in nondisclosure.¹⁷⁶⁶ In short, today's state statutory protections add little conceptually to the individual's right of privacy as set forth by Prosser. Because of the ad hoc, record-by-record approach, the statutory law, like the tort law, does not protect the fundamental “right to be let alone,” said to be the underpinning of privacy law.

It has been suggested that, in light of the need for greater openness in government, the correct approach to the problem of personal privacy in government-held information is not to limit disclosure of such information but to “restrict the government's right to gather personal information in the first instance.”¹⁷⁶⁷ In any case, there is a need for greater legislative attention to the problems of government information. Despite a growing awareness of the magnitude of the threat to privacy, only Minnesota and Utah have enacted comprehensive statutes regulating the collection, retention, and dissemination of information by all government agencies, and defining the

1760. See Bloustein, *supra* note 1564, at 993-1000.

1761. See text at notes 1678-93 *supra*.

1762. See, e.g., Adoption statutes in *Chart*, appendix to this section.

1763. See, e.g., Welfare statutes in *Chart*, appendix to this section.

1764. For example, the exception for health information in motor vehicle records. See note 1722 *supra* and accompanying text. In addition, hospital and mental hospital records are often made confidential. See, e.g., ARIZ. REV. STAT. ANN. § 36-404 (1947); CAL. WELF. & INSTNS. CODE § 5328 (West 1975); KY. REV. STAT. § 210.235 (1972); MD. ANN. CODE art. 43, § II (1957); MISS. CODE ANN. § 41-31-17 (1972); N.J. STAT. ANN. § 30:4-126.1 (1953); UTAH CODE ANN. § 64-7-50 (1968).

1765. See text at note 1721 *supra*.

1766. See text at notes 1728-29 *supra*.

1767. Letter from Sharyn L. Smith, Assistant Attorney General of Florida, to the *Michigan Law Review*, Aug. 26, 1974.

rights of data subjects.¹⁷⁶⁸ The statutes are similar in structure and approach, but there are some significant differences.

By not focusing on the type or sensitivity of information involved, the Minnesota statute recognizes the individual's broad privacy interest in controlling the flow of all information.¹⁷⁶⁹ In contrast, the Utah statute limits some rights of data subjects to "confidential" or "private" information as defined by a state records committee.¹⁷⁷⁰ Both statutes impose a standard of necessity on the collection¹⁷⁷¹ and retention¹⁷⁷² of personal data. In light of the general judicial unwillingness to second-guess administrative determinations of need¹⁷⁷³ this requirement alone might not afford much protection. However, the statutes also provide for the promulgation of statewide rules to implement the general policies,¹⁷⁷⁴ so that the "necessity" standard may be given more content in regulation.

Under the Minnesota and Utah statutes, data subjects have a right to know the intended uses of requested data¹⁷⁷⁵ and whether they may legally refuse a request for information.¹⁷⁷⁶ In addition, record keepers are required to file a statement of intended uses of data with the state commissioner¹⁷⁷⁷ and use of information for other than stated purposes without the consent of the subject is prohibited.¹⁷⁷⁸ Under the Minnesota law, however, a use is proper as long as the record keeper first makes an additional filing of intended

1768. See MINN. STAT. ANN. §§ 15.162-168 (Supp. 1975); Ch. 194, §§ 1-12, [1975] Laws of Utah 870. A bill regulating the use and transfer of computerized data by both government and private interests was defeated in Ohio. *Joint Hearings, supra* note 1641, at 218. Bills have also been introduced in California, *id.* at 1876, and Washington, *id.* at 1944. For a full discussion of the arguments and issues raised by comprehensive privacy legislation, see the analysis of the new federal law at notes 1966-2214 *infra*.

1769. MINN. STAT. ANN. § 15.162 Subd. 3 (Supp. 1975).

1770. Ch. 194, §§ 3(6), (7), 7(2)-(4), [1975] Laws of Utah 871, 872.

1771. MINN. STAT. ANN. § 15.164(a) (Supp. 1975); Ch. 194, § 6(1), [1975] Laws of Utah 872. This is similar to the provision in the federal law. See text at notes 1987-88 *infra*.

1772. MINN. STAT. ANN. § 15.164(e) (Supp. 1975); Ch. 194, § 6(5), [1975] Laws of Utah 873.

1773. See note 1636 *supra*.

1774. MINN. STAT. ANN. § 15.164 (Supp. 1975); Ch. 194, § 6, [1975] Laws of Utah 872-73.

1775. See MINN. STAT. ANN. § 15.165(b) (Supp. 1975). Under the Utah law, this right applies only to requests for confidential or personal data. Ch. 194, § 7(2), [1975] Laws of Utah 873.

1776. See MINN. STAT. ANN. § 15.165(c) (Supp. 1975). The Utah provision is limited to confidential or personal data. Ch. 194, § 7(3), [1975] Laws of Utah 873.

1777. MINN. STAT. ANN. § 15.165(a) (Supp. 1975); Ch. 194, § 7(1), [1975] Laws of Utah 873.

1778. MINN. STAT. ANN. § 15.165(d) (Supp. 1975); Ch. 194 § 7(4), [1975] Laws of Utah 873. For a discussion of comparable provisions in the federal law see notes 2107-23 *infra*.

uses.¹⁷⁷⁹ Without any restrictions on the record keeper's power to amend its filed statement of purpose this provision clearly weakens the protection against dissemination of personal information. In addition, the Minnesota statute gives no clue as to the relationship between the use restrictions and the state open-records act,¹⁷⁸⁰ and the Utah statute cryptically asserts that it shall not be construed to restrict or modify existing rights of access to public records.¹⁷⁸¹ Again, however, regulations might tighten up the statutory provisions. Both statutes also give the subject a right of access and challenge,¹⁷⁸² but the Minnesota provision is weak in two respects. First, the record keeper apparently has the choice of merely informing the subject of the "content and meaning of the data" without actually showing him or her the file.¹⁷⁸³ Second, the subject has no right of access to records made confidential by statute.¹⁷⁸⁴ This exception ignores the possibility that confidentiality may be for the protection of the subject. In contrast, the Utah law at least ensures that the subject access decision will be based on the relevant considerations by distinguishing between "confidential data," which, in the opinion of the state records committee should not be available to the subject,¹⁷⁸⁵ and "private data," which should be open to the subject.¹⁷⁸⁶ Finally, the Minnesota statute subjects any "political subdivision, responsible authority or state" to civil liability to anyone damaged by a violation of its provisions.¹⁷⁸⁷ The Utah statute imposes liability only on the record keeper designated as the responsible authority under the act.¹⁷⁸⁸ In addition to actual damages plus costs and attorney's fees, both statutes provide for exemplary damages for willful violations.

Despite their weaknesses, the Minnesota and Utah statutes represent an important, and perhaps understandably cautious step toward rationalizing and controlling state information systems. Such an approach is superior to a continuation of the ad hoc development of the right of privacy for several reasons. First, many instances of governmental intrusion are properly matters of political judgment in

1779. MINN. STAT. ANN. § 15.165(e) (Supp. 1975).

1780. See MINN. STAT. ANN. § 15.17 (1967), *as amended*, (Supp. 1975).

1781. Ch. 194, § 10, [1975] Laws of Utah 874.

1782. MINN. STAT. ANN. §§ 15.165(e), (f) (Supp. 1975); Ch. 194, §§ 7(5), (6), [1975] Laws of Utah 873-74.

1783. MINN. STAT. ANN. § 15.165(e) (Supp. 1975).

1784. MINN. STAT. ANN. § 15.165(e) (Supp. 1975). The subject also has no right of access to medical or psychological files.

1785. Ch. 194, § 3(6), [1975] Laws of Utah 871.

1786. Ch. 194, § 3(7), [1975] Laws of Utah 871.

1787. MINN. STAT. ANN. § 15.166 (Supp. 1975). Willful violation of the provisions of the act is made a misdemeanor by § 15.167.

1788. Ch. 194, § 8, [1975] Laws of Utah 874.

which the exercise of legislative restraint is a more appropriate solution than the imposition of judicial constraints. Second, the profound threat to personal privacy that is posed by expanding governmental activity is really only understandable in the context of governmental activities as a whole. One might not be overly concerned with driver's license and tax records were it not for the correlative impact of welfare, education, arrest, and numerous other records. It is the cumulative effect of governmental dossiers that seriously threatens individual identity in today's complex society, a threat that can be combatted only by a comprehensive legislative program accommodating the individual's right of privacy, the government's informational needs, and the public's interest in open government.

3. *Appendix: State Statutes*

This compilation is not exhaustive; rather it is a detailed sampling of state statutes.

Legend:

<i>A</i> —authorizes collection of information	<i>H</i> —makes all welfare records confidential
<i>B</i> —establishes state bureau of criminal identification	<i>J</i> —makes welfare records confidential but names of recipients may be disclosed
<i>C</i> —makes record confidential	<i>M</i> —authorizes or requires maintenance of files
<i>D</i> —grants agency discretion to destroy records	<i>O</i> —authorizes or requires dissemination
<i>E</i> —arrest record expungement	<i>P</i> —record made public
<i>F</i> —gives broad discretion regarding information to be collected (e.g., "and any other information deemed necessary")	<i>R</i> —rule-making authority for confidentiality granted to agency
<i>G</i> —requires collection (e.g., duty to fingerprint)	<i>S</i> —imposes sanction
	<i>X</i> —authorizes subject access

Adoption Records

- C* ALA. CODE tit. 27, § 5 (Supp. 1973).
- C* ALAS. STAT. § 20.10.130 (1962).
- C* ARK. STAT. ANN. § 56-117 (1947).
- C* CAL. CIV. CODE § 227 (West 1954).
- C* COLO. REV. STAT. ANN. § 19-4-104 (1973).
- S, X, C* CONN. GEN. STAT. ANN. § 45-66 (Supp. 1974).
- C* DEL. CODE ANN. tit. 13, §§ 923-24 (1974).
- C* D.C. CODE ANN. § 16-311 (1973).
- C* FLA. STAT. ANN. § 63.181 (1969).
- C* GA. CODE ANN. § 74-419 (1973).
- C* HAWAII REV. STAT. § 578-15 (1968).
- X, C* IDAHO CODE § 16-1511 (Supp. 1974).
- C* ILL. REV. STAT. ch. 4, § 9.1-18 (1973).
- C* IND. ANN. STAT. CODE § 31-3-1-5 (1973).

- C IOWA CODE ANN. § 238.24 (1969).
 C KAN. STAT. ANN. § 59-2279 (1964).
 C KY. REV. STAT. ANN. § 199.570 (1972).
 S, C LA. REV. STAT. ANN. § 9:437 (West 1965).
 C ME. REV. STAT. ANN. tit. 19, § 534 (1964).
 C MASS. ANN. LAWS ch. 210, § 5C (Supp. 1974).
 C MICH. COMP. LAWS ANN. § 710.11 (Supp. 1974).
 C MINN. STAT. ANN. § 259.31 (1964).
 C MISS. CODE ANN. § 93-17-25 (1972).
 S, C MO. ANN. STAT. § 453.120 (Vernon 1952).
 M, C; C MONT. REV. CODES ANN. § 10-703 (1968); § 59-512 (1970).
 C NEB. REV. STAT. § 43-113 (1974).
 C; C; C NEV. REV. STAT. § 127.130 (1973); § 127.140 (1973); § 440.320 (1973).
 S, C N.H. REV. STAT. ANN. § 170-B:19 (Supp. 1973).
 X, C N.J. STAT. ANN. § 9:3-31 (1960).
 X, C N.M. STAT. ANN. § 22-2-34 (1973).
 C; S, C N.Y. PUB. HEALTH LAW § 4138.3(a) (McKinney Supp. 1974);
 DOM. REL. LAW § 114 (McKinney Supp. 1974).
 S, C N.C. GEN. STAT. § 48-25 (Supp. 1974).
 C N.D. CENT. CODE § 14-15-16 (1971).
 C OHIO REV. CODE ANN. § 3107.14 (Page 1972).
 S, C OKLA. STAT. ANN. tit. 10, § 57 (1961).
 C ORE. REV. STAT. § 7.211 (1975).
 C PA. STAT. ANN. tit. 35, § 450.802(2) (1964).
 A, M; S, C R.I. GEN. LAWS ANN. § 23-3-14 (1968); § 23-3-23 (Supp. 1974).
 S, C S.C. CODE ANN. § 15-1291.28 (1962) (protects records of state domestic relations court).
 X, C S.D. COMP. LAWS ANN. § 25-6-15 (1967).
 S, C TENN. CODE ANN. § 36-130 (1955).
 M, C TEX. FAM. CODE ANN. § 11.17 (Supp. 1973).
 C UTAH CODE ANN. § 78-30-15 (1953).
 C VT. STAT. ANN. tit. 15, § 452 (1974).
 X, C VA. CODE ANN. § 63.1-236 (1973).
 C WASH. REV. CODE § 26.32.120(2) (1974).
 C W. VA. CODE ANN. § 48-4-4 (Supp. 1974).
 C WIS. STAT. ANN. § 48-93 (1974).
 C WYO. STAT. ANN. § 1-708(c) (Supp. 1973).

Arrest and Criminal Identification Records

- M, A, O; ALAS. STAT. § 12.62.020 (1962) (only specified information
 E; X; S may be stored on central computer system); § 12.62.040
 (1962) (bureau must establish procedures for destruction
 of records on basis of certain listed factors); § 12.62.030(c)
 (1962); § 12.62.060 (1962).
 B; M, A; ARIZ. REV. STAT. ANN. § 41-1750A (Supp. 1973); § 41-1750B.1
 O; X; S (Supp. 1973); §§ 41-1750B.5 to .8 (Supp. 1973); § 41-
 1750B.9 (Supp. 1973); § 41-1750D (Supp. 1973).

- B; A, M;* ARK. STAT. ANN. § 5-832 (1947); § 5-833 (Supp. 1973);
O, X; G § 5-838 (Supp. 1973).
F; O CAL. PENAL CODE § 11101 (West 1972); § 11076 (West 1972)
(criminal identification information may be disseminated
only to those specified in the statute).
A, O; E; C CONN. GEN. STAT. ANN. § 29-12 (1958); § 29-15 (Supp. 1974);
§ 29-16 (1958).
O; X; A DEL. CODE ANN. tit. 11, § 8511 (1974); tit. 11, § 8511(4)
(1974); tit. 11, § 8519 (1974) (limits access to certain
authorized individuals).
G, O FLA. STAT. ANN. § 30.31 (Supp. 1973).
B; A GA. CODE ANN. § 92A-301 (1972); § 92A-302 (1972).
A; E, S, C HAWAII REV. STAT. § 28-52 (1968); § 28-54 (Supp. 1974).
A; E; S, C ILL. REV. STAT. ch. 38, §§ 206-1 to -5 (1973); ch. 38, § 206-5
(1973) (petition for expungement must be accompanied
by a waiver of claims against arresting officer); ch. 38,
§ 206-7 (1973).
M, B; A IND. ANN. STAT. CODE § 10-1-1-12 (1973); § 10-1-1-20
(1973).
A, B, X IOWA CODE ANN. §§ 749B.1-.20 (Supp. 1974).
B; G; M; O LA. REV. STAT. ANN. § 15:581.1 (West 1967); §§ 15:581.2, .19
(West 1967); § 15:581.8 (West 1967); §§ 15:581.10 (West
Supp. 1975), .17 (West 1967).
E, S; A; C ME. REV. STAT. ANN. tit. 15, § 2161A (Supp. 1974), tit. 16,
§ 600 (Supp. 1974); tit. 25, § 1542 (Supp. 1974); tit. 25,
§ 1631 (1964).
B; A, E MICH. COMP. LAWS §§ 28.241-.249 (1970); § 28.243 (1970).
B; M; G; E MINN. STAT. ANN. § 299C.01 (1964); § 299C.09 (1964);
§ 299C.10 (1964); § 299C.11 (1964).
F, G; C, MO. ANN. STAT. § 222.050 (Vernon 1952); §§ 610.100-.105
E, X; S (Vernon Supp. 1975); § 610.115 (Vernon Supp. 1975).
B; F, M; MONT. REV. CODES ANN. § 82A-1202 (Supp. 1974), *amending*
F, G, E § 80-2001 (1966); § 80-2002 (1966); § 80-2003 (1966).
F, G NEB. REV. STAT. § 29-209 (1964).
F, G; N.H. REV. STAT. ANN. § 106-B:13 (1964);
C, M, S § 106-B:14 (Supp. 1973).
B; F, M; G N.J. STAT. ANN. § 53:1-12 (1953); § 53:1-13 (1953); § 53:1-15
(1953).
M; G N.M. STAT. ANN. § 39-3-1 (1953); § 39-3-8 (1953).
E N.Y. CIV. RIGHTS LAW § 79e (McKinney Supp. 1974).
B; A, O N.C. GEN. STAT. § 114-12 (1966); § 114-19 (Supp. 1975).
B; M; G N.D. CENT. CODE § 12-60-01 (1960); § 12-60-10 (1960);
§ 12-60-11 (Supp. 1973).
B; A, M; OHIO REV. CODE ANN. § 109.51 (Page 1969); § 109.57 (Page
G, E Supp. 1973); § 109.60 (Page Supp. 1973).
B, M; A; G OKLA. STAT. ANN. tit. 74, § 152 (1961); tit. 74, § 157 (1961);
tit. 74, § 158 (1961) (excludes misdemeanants or violators
of city ordinances).
G; C ORE. REV. STAT. § 181.510 (1975); § 181.540 (1975).

- B; F; G; E, S* R.I. GEN. LAWS ANN. § 12-1-4 (1969); § 12-1-7 (1969); § 12-1-10 (1969) (excludes those charged with violations of ordinances or "minor offenses"); § 12-1-12 (1969).
- F; G, S; O* S.D. COMP. LAWS ANN. §§ 23-5-1, 23-6-5 (1967); § 23-5-4 (1967); § 23-6-9 (1967).
- C* TENN. CODE ANN. § 15-305 (Supp. 1974).
- A, B* TEX. REV. CIV. STAT. ANN. art. 4413(14) (1966).
- G; M; C; E* UTAH CODE ANN. § 77-59-9 (1953); § 77-59-17 (1953); § 77-59-27 (Supp. 1973); § 77-35-17.5 (1953).
- F, B; G, R, S; C, R* VT. STAT. ANN. tit. 20, § 2051 (Supp. 1974); tit. 20, § 2054 (Supp. 1974); tit. 20 § 2056 (Supp. 1974).
- A; G; A* VA. CODE ANN. § 15.1-135 (1973); § 19.1-19.3 (Supp. 1974); § 19.1-19.6 (Supp. 1974).
- A, B; F; O, S; C; E, X; F, G* WASH. REV. CODE § 43.43.500 (1974); § 43.43.700 (1974); § 43.43.705 (imposes civil liability for wrongful disclosure; only identification data and public records may be disclosed, and only to criminal justice agencies); § 43.43.710 (1974); § 43.43.730 (1974); § 43.43.735 (1974).
- B, F; C; G; E* W. VA. CODE ANN. § 15-2-29(a) (1972); § 15-2-29(d) (1972) (bureau may furnish information to private agencies, but only with written authorization of the subject); § 15-2-29(g) (1972); § 15-2-29(h) (1972).
- F, B; F, G* WIS. STAT. ANN. § 165.83 (1974); § 165.84 (1974).

Parole Records

- C, X* ALAS. STAT. § 33.15.140 (1962).
- C* CAL. PENAL CODE § 3046 (West 1970).
- C* COLO. REV. STAT. ANN. § 17-1-104 (1973).
- A, M, R* FLA. STAT. ANN. § 947.14 (1974).
- C; S* GA. CODE ANN. § 77-533 (1973); § 77-9911 (1973).
- C* KY. REV. STAT. ANN. § 439.510 (1972).
- C* MISS. CODE ANN. § 47-7-21 (1972).
- C, X* MO. ANN. STAT. § 549.285 (Vernon Supp. 1975).
- M, C, X* MONT. REV. CODES ANN. § 95-3206 (Supp. 1974).
- M* NEB. REV. STAT. § 29-2626 (1964).
- C* NEV. REV. STAT. § 213.1098 (1973).
- C, M, R* N.J. STAT. ANN. § 30:4-123.31 (1953).
- C, X* N.M. STAT. ANN. § 41-17-18 (1953).
- R* N.Y. CORREC. LAW § 221 (McKinney Supp. 1974).
- C, X* N.D. CENT. CODE § 12-59-04 (Supp. 1973).
- F; G; E* PA. STAT. ANN. tit. 19, § 1401 (1964); tit. 19, § 1403 (1964); tit. 19, § 1405 (1964) (requires destruction of fingerprints of those acquitted).
- C* S.C. CODE ANN. § 55-579 (1962).
- A, M, R* TENN. CODE ANN. § 40-3616 (1955).

Motor Vehicle Records

- M; P* ALA. CODE tit. 36, § 73 (1958); tit. 36, § 74(44) (1958).
- C; P* CAL. VEHICLE CODE § 1808.5 (West 1971) (medical informa-

- tion must be held confidential); § 1810 (West 1971) (authorizes sale of information).
- P; D* COLO. REV. STAT. ANN. § 42-1-206 (1973); § 42-1-215 (1973).
- C, D* CONN. GEN. STAT. ANN. § 14-10 (1958).
- P, S, D* DEL. CODE ANN. tit. 21, § 305 (1974) (makes public all records less than three years old; provides sanctions for unauthorized use of older records).
- P* FLA. STAT. ANN. § 319.25(5)(a) (1968) (authorizes sales of information).
- M; P* GA. CODE ANN. § 92A-429 (1972); § 92A-603 (1972).
- P, D* IND. ANN. STAT. CODE § 9-1-1-8 (Burns 1973) (authorizes compilation and sale of information).
- M* IOWA CODE ANN. § 321.199 (1966).
- P* LA. REV. STAT. ANN. § 47: 1508(7) (West 1970) (makes public any information "not generally considered confidential").
- P, D* MASS. ANN. LAWS ch. 90, § 30 (Supp. 1974).
- P* MICH. COMP. LAWS ANN. §§ 257.502, 4.740-760 (1970).
- A, M, P; D; A* MO. ANN. STAT. § 301.350 (Vernon 1972); § 301.360 (Vernon 1972); § 302.171 (Vernon 1972).
- A; M; D, M, P* MONT. REV. CODES ANN. § 31-130 (Supp. 1974); § 31-141 (Supp. 1974); § 53-101 (Supp. 1974).
- M, P* NEB. REV. STAT. § 60-412 (1974).
- F; M; P* NEV. REV. STAT. § 483.290 (1973); § 483.400 (1973); § 485.135 (1973).
- M, P* N.H. REV. STAT. ANN. § 259:10 (1966).
- D, M* N.J. STAT. ANN. § 39:3-28 (1953).
- D, P* N.M. STAT. ANN. § 64-2-8 (1972) (authorizes sale of information).
- P* N.Y. VEH. & TRAF. LAW § 202(3) (McKinney Supp. 1974) (authorizes sale of information).
- P* N.C. GEN. STAT. §§ 20-26, -27 (Supp. 1974) (excepts medical information and provides for copying service).
- P; P* OHIO REV. CODE ANN. § 4503.26 (Page 1973) (authorizes sale of information); § 4507.25 (Page 1973).
- P* OKLA. STAT. ANN. tit. 47, §§ 6-117(g), (h) (Supp. 1974).
- P; M, D* PA. STAT. ANN. tit. 75, § 417 (1971) (authorizes sale of information); tit. 75, § 610 (1971).
- F* R.I. GEN. LAWS ANN. § 31-10-12 (1968).
- P; D* S.C. CODE ANN. § 46-120 (1962) (authorizes sale of information); § 46-121 (1962).
- M* S.D. COMP. LAWS ANN. § 32-12-60 (1967).
- M, P* TENN. CODE ANN. § 59-711 (1968), *as amended*, (Supp. 1974) (authorizes sale of information).
- A; M* TEX. REV. CIV. STAT. ANN. art. 6687b, § 6 (1969); art. 6687b, § 21 (1969).
- F; M; P* UTAH CODE ANN. § 41-2-11 (1953); § 41-2-12 (1953); § 41-2-12.1 (1953) (authorizes sale of information).
- P, R; P* VA. CODE ANN. § 46.1-31 (1974); § 46.1-32 (1974) (authorizes sale of information).

- F; D, P* W. VA. CODE ANN. § 17-2-6 (1974); § 17A-2-14 (1974).
M WIS. STAT. ANN. § 343.23 (1971).
A; M WYO. STAT. ANN. § 31-276.10 (Supp. 1973); § 31-276.19 (Supp. 1973).

School Records

- C; X* CAL. EDUC. CODE § 10751 (West 1974); § 10757 (West 1974).
C, X COLO. REV. STAT. ANN. § 24-72-204 (1973).
C CONN. GEN. STAT. ANN. § 10-209 (1958) (medical and psychological exams).
C, X DEL. CODE ANN. tit. 14, § 4111 (1974) (protects school officials by denying a cause of action against them for the contents of records).
C, X ME. REV. STAT. ANN. tit. 20, § 805 (Supp. 1974).
R; X; D MASS. ANN. LAWS ch. 71, § 34D (Supp. 1974); ch. 71, § 34E (Supp. 1974); ch. 71, § 34F (Supp. 1974).
C, D, X; M MISS. CODE ANN. § 37-15-3 (Supp. 1974); § 37-15-1 (Supp. 1974).
C, D, E NEB. REV. STAT. § 79-4,157 (Supp. 1974); § 79-4,158 (1943);
X; R; M § 79-443 (1971).
P, R N.J. STAT. ANN. § 18A:36-19 (1953) (provides rule-making power for public inspection of records; relieves school officials from liability for furnishing information).
M N.Y. EDUC. LAW § 142 (McKinney Supp. 1974).
M OHIO REV. CODE ANN. § 3319.32 (Page 1972).
C, R, X ORE. REV. STAT. § 336.195 (1975).
G, M PA. STAT. ANN. tit. 24, §§ 15-1531 to -1532 (1962).
S R.I. GEN. LAWS ANN. § 16-38-5 (1969) (prohibits use of questionnaires which would violate a student's right of privacy without prior approval of the school board).
C TENN. CODE ANN. § 15-305 (Supp. 1974).
A W. VA. CODE ANN. § 18A-5-5 (1974).

Tax Returns

- C, S* ALA. CODE tit. 51, § 786(28) (1958).
C ALAS. STAT. § 09.25.100 (1962).
C, D ARK. STAT. ANN. § 84-2046 (1947).
C; C, S; CAL. REV. & TAX CODE § 451 (West 1971) (property); § 16563
C, S (West 1970) (gift); § 30455 (West 1970) (cigarette).
C, S; C, S D.C. CODE ANN. § 47-1412 (1973) (property); §§ 47-1521(a),
 (e) (1973) (income).
A; C GA. CODE ANN. §§ 92-3208, -3213 (1974); § 92-3216 (1974).
C, S HAWAII REV. STAT. § 235-116 (1968).
C, S ILL. REV. STAT. ch. 120, § 9-917 (1973) (allows names and addresses to be published).
C, P; C, S IND. ANN. STAT. CODE § 6-1-39-2 (Burns 1972) (makes income information confidential but assessment information public); § 6-3-6-8 (1972).

- C, S; A; C* IOWA CODE ANN. § 422.20 (1971); § 422.21 (Supp. 1974); § 450.68 (1971).
- C* KY. REV. STAT. ANN. § 131.190 (Supp. 1974).
- C* LA. REV. STAT. ANN. § 44:4(1) (West 1951).
- C, D, S* ME. REV. STAT. ANN. tit. 36, § 5340 (Supp. 1973).
- P; C, X;* MD. ANN. CODE art. 81, § 45(a) (1957) (real property); art. 81, § 45(b) (1957) (personal property); art. 81, § 300 (1957) (income); art. 81, § 301 (1957).
- C, S* MASS. ANN. LAWS ch. 62, § 58 (Supp. 1974).
- C, S, O* MICH. COMP. LAWS ANN. §§ 206.465-466 (Supp. 1974) (makes available to any state officer when required for efficient administration of laws).
- C, S* MINN. STAT. ANN. § 290.61 (1964).
- C, D* MISS. CODE ANN. § 27-7-83 (1972).
- C, D, S* MONT. REV. CODES ANN. § 84-4931 (Supp. 1974).
- M, P; C* N.H. REV. STAT. ANN. § 76:7 (1970), *as amended*, § 544:8 (Supp. 1973) (property); § 77:19 (1970), *as amended*, § 544:8 (Supp. 1973) (income).
- C; D* N.J. STAT. ANN. § 54:50-8 (1953); § 54:50-10 (1953).
- F* N.M. STAT. ANN. § 17-15A-10 (1953).
- C, S* N.Y. TAX LAW § 697(e) (McKinney Supp. 1974).
- C, S* N.C. GEN. STAT. § 105-259 (Supp. 1974).
- A; S, C* N.D. CENT. CODE § 57-38-42 (1972); § 57-38-57 (1972).
- C, X, S* OKLA. STAT. ANN. tit. 68, § 205 (1961).
- C; C; C* ORE. REV. STAT. § 306.129(1) (1975); § 308.290 (1975); § 314.835 (1975).
- C, S; F* PA. STAT. ANN. tit. 72, § 731 (Supp. 1975); tit. 72, § 3402-401.B (1964).
- O; D* R.I. GEN. LAWS ANN. § 44-1-14 (1970); § 44-1-15 (1970).
- C, S;* S.C. CODE ANN. § 65-307 (1962) (income); § 65-1477 (1962).
- C, D, S* S.D. COMP. LAWS ANN. § 10-43-48 (1967) (bank income tax).
- C, S* TENN. CODE ANN. § 67-2630 (Supp. 1974) (income from stocks and bonds).
- A, C* TEX. TAX. GEN. ANN. art. 1.031 (1969).
- C, X, S* UTAH CODE ANN. § 59-14-72 (1974).
- C, D, X,* VT. STAT. ANN. tit. 32, § 5815 (Supp. 1974); tit. 32, § 5867 *S; F* (1970).
- C, S* VA. CODE ANN. § 58-46 (Supp. 1974). (governor may authorize any information to be made public).
- C, S* WASH. REV. CODE § 83.36.020 (1974).
- C* W. VA. CODE ANN. § 11-21-80(d) (1974).
- C; P, S;* WIS. STAT. ANN. § 71.11(44)(a) (Supp. 1974) (prohibits sale of information, but authorizes newspaper publication of information); § 71.11(44)(b) (Supp. 1974) (requires net tax paid or payable by any taxpayer to be made available upon request of any resident); § 71.11(44)(c) (Supp. 1974).
- C, X, S*

Welfare Records

- D; J* ALA. CODE tit. 49, § 12(31e) (Supp. 1973); tit. 49, § 17(32) (Supp. 1973).
- H* ALAS. STAT. § 47.05.030 (Supp. 1974).
- R* ARIZ. REV. STAT. ANN. § 46-135 (Supp. 1975).
- H, R, S* ARK. STAT. ANN. § 83-138 (1960).
- H, S; X; D; J* CAL. WELF. & INSTNS. CODE § 10850 (West 1972), *as amended*, (West Supp. 1975); § 10850.2 (West 1972); §§ 10851 (1972), § 10851.5 (West Supp. 1975); § 17006 (West 1972).
- H, R, S, X; P* COLO. REV. STAT. ANN. § 26-1-114 (1973); §§ 30-17-101 to -104 (1973) (applicable to nonfederally funded programs).
- H, S; M, P* CONN. GEN. STAT. ANN. § 17-83 (1958); § 17-291 (applicable to nonfederally funded programs).
- H, S* DEL. CODE ANN. tit. 31 § 1101 (1974).
- J; S* D.C. CODE ANN. § 3-211 (1973); § 3-212 (1973).
- A, O; D* FLA. STAT. ANN. § 409.365 (Supp. 1974); § 409.375 (Supp. 1974).
- J, R; S* GA. CODE ANN. § 99-2910 (1968); § 99-9903 (1968).
- H; S; A* HAWAII REV. STAT. § 346-10 (1968); § 346-11 (1968); §§ 346-29, -72 (1968).
- H, R* IDAHO CODE § 56-221 (1948).
- J; P* ILL. REV. STAT. ch. 23, § 11-9 (1973); ch. 23, § 11-11 (1973).
- J* IND. ANN. STAT. CODE §§ 12-1-10-2, -3 (Burns 1973).
- A; H, S* IOWA CODE ANN. § 239.3 (Supp. 1974); § 217.30 (Supp. 1974).
- J, S* KAN. STAT. ANN. § 39-713(b) (1973).
- H; D* KY. REV. STAT. ANN. § 205.175 (1972); § 205.180 (Supp. 1974).
- J, S* LA. REV. STAT. ANN. § 46:65 (West Supp. 1974).
- H* ME. REV. STAT. ANN. tit. 22, § 4496 (Supp. 1974).
- H, S* MD. ANN. CODE art. 88A, § 6 (1957).
- H, S* MASS. ANN. LAWS ch. 271, § 43 (1956).
- H* MICH. COMP. LAWS ANN. § 400.35 (1970).
- P, S* MISS. CODE ANN. § 43-1-19 (1972) (names and amounts received are public; sanctions provided against "political or commercial" use of such information).
- M; J, S* MO. ANN. STAT. § 205.940 (Vernon 1972); § 208.120 (Vernon Supp. 1975).
- A, M; J, D, S* MONT. REV. CODES ANN. § 71-231 (1971); §§ 71-231.1 to -231.3 (1971).
- J; S* NEB. REV. STAT. §§ 68-313 to -313.1 (1971); § 68-314 (1971).
- R; D* NEV. REV. STAT. § 422.290 (1973); § 426.480 (1973).
- M, F* N.J. STAT. ANN. § 44:8-111 (Supp. 1974).
- J, R, S* N.M. STAT. ANN. § 13-1-37 (1968).
- C* N.Y. Soc. SERV. LAW §§ 136, 136a (McKinney Supp. 1974) (news agency allowed to inspect disbursement records upon providing assurance that names and addresses of recipients will not be disclosed; tax department can use records in fraud investigations).
- J, S* N.C. GEN. STAT. § 108-45 (Supp. 1974).

- H, S* N.D. CENT. CODE §§ 50-09-13, 50-24-31 (1974).
P OHIO REV. CODE ANN. § 329.091 (Page Supp. 1974) (makes public lists of names and amounts of assistance; prohibits commercial or political use).
J, S OKLA. STAT. ANN. tit. 56, § 183 (1961).
J ORE. REV. STAT. §§ 411.320-335 (1975) (prohibits use for commercial and political purposes).
J, R PA. STAT. ANN. tit. 62, § 404 (Supp. 1974) (prohibits commercial or political uses of names).
H, X, S R.I. GEN. LAWS ANN. § 40-6-12 (Supp. 1974).
R; P S.C. CODE ANN. § 71-14 (1962); § 71-14.1 (Supp. 1974).
J; R; S S.D. COMP. LAWS ANN. § 28-1-29 to -31 (1967); § 28-1-32 (1967); § 28-1-35 (1967).
P; J, S TENN. CODE ANN. § 14-117 (1973); § 14-329 (1973).
H TEX. REV. CIV. STAT. ANN. art. 695c, § 33 (1964).
P, R, S UTAH CODE ANN. §§ 55-15a-19, -26 (1974).
H VT. STAT. ANN. tit. 33, § 2511 (Supp. 1974).
H, S VA. CODE ANN. § 63.1-53 (Supp. 1974).
J, S WASH. REV. CODE § 74.04.060 (1974).
J, S W. VA. CODE ANN. § 9-11-16 (1969).
J, S WIS. STAT. ANN. § 49.53 (1957), *as amended*, (Supp. 1974).
J, R, S WYO. STAT. ANN. § 42-19 (Supp. 1973).

C. *The Federal Constitutional Law of Privacy*

1. *Inherent Limitations on the Federal Government's Power To Collect Information*

The federal government is restricted to operating within the powers enumerated in the Constitution—a restriction that constitutes an inherent limitation on information collection by both Congress and the executive branch. While the power of Congress to collect information¹⁷⁸⁹ is nowhere specifically enumerated, it has

¹⁷⁸⁹ See generally M. DIMOCK, CONGRESSIONAL INVESTIGATING COMMITTEES (1929); E. EBERLING, CONGRESSIONAL INVESTIGATIONS (1928); M. MCGEARY, THE DEVELOPMENTS OF CONGRESSIONAL INVESTIGATIVE POWER (1940); Alfange, *Congressional Investigations and the Fickle Court*, 30 U. CIN. L. REV. 113 (1961); Boudin, *Congressional and Agency Investigations: Their Uses and Abuses*, 35 VA. L. REV. 143 (1949); Coudert, *Congressional Inquisition and Individual Liberty*, 15 VA. L. REV. 537 (1929); Cousens, *The Purpose and Scope of Investigations Under Legislative Authority*, 26 GEO. L.J. 905 (1938); Driver, *Constitutional Limitations on the Power of Congress To Punish Contempts of Its Investigating Committees*, 38 VA. L. REV. 887 (1952); Ford, *The Lawyer and the Congressional Investigation*, 21 S. CAL. L. REV. 242 (1948); Gose, *The Limits of Congressional Investigating Power*, 10 WASH. L. REV. 61 (1935); Hamilton, *The Inquisitorial Power of Congress*, 23 A.B.A.J. 511 (1937); Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (1926); Lashley, *The Investigating Power of Congress: Its Scope and Limitations*, 40 A.B.A.J. 763 (1954); Loring, *Powers of Congressional Investigation Committees*, 8 MINN. L. REV. 595 (1924); Massey, *Congressional Investigations and Individual Liberties*, 25 U. CIN. L. REV. 323 (1956); Merry, *The Investigating Power of Congress: Its Scope and Limitations*, 40 A.B.A.J. 1073 (1954); McGeary, *The Congressional Power of Investigation*, 28 NEB. L. REV. 516 (1949); Moreland, *Congressional Investigations and Private Persons*, 40 S. CAL. L. REV. 189 (1967); Tunstall, *The Investigating Power of Congress: Its Scope and Limitations*, 40 VA. L. REV. 875 (1954).

been found to exist by implication as a necessary adjunct to the exercise of those powers that are enumerated.¹⁷⁹⁰ There are five express powers from which congressional authority to collect information can be implied: the powers to enumerate the population,¹⁷⁹¹ to impeach,¹⁷⁹² to judge congressional election returns,¹⁷⁹³ to discipline and expel members of Congress,¹⁷⁹⁴ and to legislate.¹⁷⁹⁵ The census clause of the Constitution literally permits merely an enumeration of "free Persons . . . excluding Indians not taxed,"¹⁷⁹⁶ although the census has in fact been used extensively as a means of collecting information from the citizenry.¹⁷⁹⁷ The Supreme Court has not yet ruled whether the census power will support collection of information unrelated to actual enumeration,¹⁷⁹⁸ and the deliberations of the framers are unrevealing.¹⁷⁹⁹ One could logically conclude that the scope of the census power is limited to an actual counting. The Second Circuit, however, has held that the express language of the

1790. The seminal case concerning implied powers is *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). For a discussion of implied powers in the context of the collection of information see *McGrain v. Daugherty*, 273 U.S. 135, 160-75 (1927).

1791. U.S. CONST. art. I, § 2, cl. 3, requires: "The actual Enumeration shall be made within three years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."

1792. U.S. CONST. art. I, § 2, cl. 5, provides: "The House of Representatives . . . shall have the sole Power of Impeachment." U.S. CONST. art. I, § 3, cl. 6, provides: "The Senate shall have the sole Power to try all Impeachments."

1793. U.S. CONST. art. I, § 5, cl. 1, provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ."

1794. U.S. CONST. art. I, § 5, cl. 2, provides: "Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."

1795. U.S. CONST. art. I, § 1, provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Legislative powers are enumerated more specifically in U.S. CONST. art. I, § 8.

1796. U.S. CONST. art. I, § 2, cl. 3.

1797. See *Hearings on the Census*, *supra* note 1509, at 460 (memorandum from the Census Bureau). See also Fernandez, *The Census*, 42 S. CAL. L. REV. 245 (1969); text at notes 1925-38 *infra*; notes 1990-93 *infra* and accompanying text.

1798. The Court, in *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 536 (1870) (Legal Tender Cases) noted in dictum:

[A] power may exist as an aid to the execution of an express power, or an aggregate of such powers, though there is another express power given relating in part to the same subject but less extensive. Another illustration of this may be found in connection with the provisions respecting a census. The Constitution orders an enumeration of free persons in the different States every ten years. The direction extends no further. Yet Congress has repeatedly directed an enumeration not only of free persons in the States but of free persons in the Territories, and not only an enumeration of persons but the collection of statistics respecting age, sex, and production. Who questions the power to do this?"

1799. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 600-06 (M. Farrand ed., rev. ed. 1937). The debates do not indicate the intended scope of the census power. The primary discussions related to problems of representation, *i.e.*, whether wealth was a proper measure and who would be counted.

Constitution limiting the census to an enumeration "does not prohibit the gathering of other statistics, if 'necessary and proper,' for the intelligent exercise of other powers enumerated in the constitution, and in such case there could be no objection to acquiring this information through the same machinery by which the population is enumerated"1800

An implied power to investigate exists under each of the other four powers. It is available to Congress for the purpose of collecting information necessary to an informed exercise of those powers,¹⁸⁰¹ but is limited by the breadth of the express functions to which it attaches. Three of these express functions—the power to impeach, the power to judge congressional election returns, and the power to discipline and expel members of Congress—are judicial in nature.¹⁸⁰² Because Congress is primarily a legislative body and because the three judicial powers reserved to Congress are extremely limited in scope, the investigative powers arising under these functions will be used in far fewer instances than the investigative power falling under the legislative function.¹⁸⁰³

The parameters of the investigative power inferred from the legislative function were established in *Kilbourn v. Thompson*¹⁸⁰⁴ and *McGrain v. Daugherty*.¹⁸⁰⁵ Prior to 1880, the courts had given Congress almost unlimited power to investigate,¹⁸⁰⁶ but in *Kilbourn*, the Supreme Court upheld a citizen's right not to respond to congressional subpoenas issued in an investigation in furtherance of an illegitimate purpose. The Court noted that the inquiry could not be "simply a fruitless investigation into the personal affairs of indi-

1800. *United States v. Moriarity*, 106 F. 886, 891 (2d Cir. 1901).

1801. Concerning investigations relating to the power to legislate see *Eastland v. United States Servicemen's Fund, Inc.*, 43 U.S.L.W. 4635, 4639-40 (U.S. May 27, 1975); *McGrain v. Daugherty*, 273 U.S. 135 (1927); text at notes 1804-19 *infra*. Concerning investigations relating to the power to judge congressional election returns see *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929). Concerning investigations relating to the power to discipline and expel members of Congress see *In re Chapman*, 166 U.S. 661, 668 (1897). See generally *Moreland*, *supra* note 1789.

1802. *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929).

1803. Although it is clear that the power of investigation exists under the impeachment clause, no cases have arisen on this matter. See *Moreland*, *supra* note 1789, at 224. *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929), is the only case directly concerning the investigative power pursuant to the congressional authority to judge election returns, although both *United States v. Norris*, 300 U.S. 564 (1937), and *Roudebush v. Hartke*, 405 U.S. 15 (1972), indicated that such a power exists. Finally, other than *Powell v. McCormack*, 395 U.S. 486 (1969), which assumes but does not discuss the investigative power, *In re Chapman*, 166 U.S. 661 (1897), is the sole Supreme Court case on investigations relating to the authority to discipline and expel members. *United States v. Brewster*, 408 U.S. 501 (1972), does, however, discuss in dictum the nature and extent of the congressional power to discipline members.

1804. 103 U.S. 168 (1880).

1805. 273 U.S. 135 (1927).

1806. See *Moreland*, *supra* note 1789, at 189-211, and cases cited therein.

viduals,"¹⁸⁰⁷ but must be capable of resulting in "valid legislation on the subject to which the inquiry referred."¹⁸⁰⁸ In *McGrain*, the Court upheld subpoenas issued in an investigation of the Justice Department for the purpose of formulating reform legislation. The Court reasoned that "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."¹⁸⁰⁹ It is today clear that the legislative power "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes . . . , includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them . . . , [and] comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."¹⁸¹⁰ Thus, while the requirement of a proper legislative purpose constitutes a restraint on Congress, the sphere of legitimate legislative activity, as the Court suggested recently in *Eastland v. United States Servicemen's Fund*,¹⁸¹¹ is sufficiently broad to justify an inquiry into almost any question of national interest.

A further limitation on the congressional investigative power is that all questions must be pertinent to the asserted legislative purpose.¹⁸¹² When an investigation is conducted by either the full House or Senate this limitation is of little consequence since Congress'

1807. 103 U.S. at 195.

1808. 103 U.S. at 195. Of interest are the conflicting interpretations given *Kilbourn* by the majority and concurring opinions in *Eastland v. United States Servicemen's Fund*, 43 U.S.L.W. 4635 (U.S. May 27, 1975), discussed in the text at notes 1873-76 *infra*. In *Kilbourn* the House of Representatives attempted to punish an individual for contempt for refusal to comply with a congressional subpoena. The Court invalidated the House's effort, reasoning that the subject matter of the investigation was judicial and not legislative, and that the House had thus "assumed a power which could only be properly exercised by another branch of the government . . ." 103 U.S. at 192. The majority in *Eastland* stated that the subpoena at issue in *Kilbourn* was subject to attack because it was not essential to legislating. 43 U.S.L.W. at 4640. The concurring opinion of Justices Marshall, Brennan, and Stewart, however, stated that the individual in *Kilbourn* was able to attack the subpoena because his suit was brought against the House Sergeant at Arms, who was carrying out the unconstitutional directive, rather than against House members or their legislative aides. 43 U.S.L.W. at 4643. The concurring justices thus sought to emphasize that congressional subpoenas within the legislative sphere are subject to attack as long as Congressmen or their aides are not the parties defendant.

1809. 273 U.S. at 175. The Court also observed: "In actual legislative practice power to secure needed information . . . has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures." 273 U.S. at 161.

1810. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

1811. 43 U.S.L.W. 4635, 4639-41 (U.S. May 27, 1975).

1812. See *Sinclair v. United States*, 279 U.S. 263 (1929). See also *Deutch v. United States*, 354 U.S. 178 (1957). The pertinency requirement has been codified at 2 U.S.C. § 192 (1970).

power to legislate in so many areas virtually ensures that there will be a proper legislative purpose to which almost any question could be pertinent.¹⁸¹³ Most investigations, however, are carried out by congressional committees¹⁸¹⁴ or federal agencies¹⁸¹⁵ to which Congress has delegated its investigatory power for specific purposes through authorizing resolutions or statutes.¹⁸¹⁶ Authorizing resolutions are often broad in scope, but there is at least a minimal requirement that such resolutions delineate the agency's "jurisdiction and purpose with sufficient particularity" to ensure that compulsory process is used only in furtherance of a legislative purpose,¹⁸¹⁷ and at times agency investigations exceeding the bounds of congressional authorizations have been disallowed and witnesses permitted to forgo responding to inquiries.¹⁸¹⁸ While Congress can amend delegating legislation to enable questions to satisfy the purpose and pertinancy requirements, amending resolutions or legislation require considerable congressional effort and are unlikely to be enacted except in cases of great concern. Where a witness objects to the pertinancy of a question at a committee hearing, "unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body . . . to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto."¹⁸¹⁹ On the basis of this requirement, which is derived from the due process clause of the fifth amendment, the Court on several occasions has reversed contempt convictions resulting from refusals to answer investigative in-

1813. See *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929).

1814. See, e.g., *Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957).

1815. See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Electric Bond & Share Co. v. SEC*, 303 U.S. 419 (1938); *Sinclair v. United States*, 279 U.S. 263 (1928); *ICC v. Brimson*, 154 U.S. 447 (1894). See also Note, *Investigatory Powers of Congress and Administrative Agencies*, 26 WASH. U. L.Q. 531 (1941). Congress' power of investigation was held to be delegable to federal administrative agencies in *ICC v. Brimson*, 154 U.S. 447 (1894).

1816. For codified examples of congressional delegation of investigatory powers to administrative agencies see 26 U.S.C. § 7602 (1970) (examination of books, papers, or records to ascertain the accuracy of any tax return); 44 U.S.C. §§ 3501-11 (1970) (procedure to be followed by federal agencies in collecting information, including hearings as to the necessity of such collection). See generally 13 U.S.C. §§ 41, 44, 61, 62, 101, 102, 131, 141, 142, 161, 301 (1970) (permitting Census Bureau to collect information unrelated to enumeration).

1817. *Watkins v. United States*, 354 U.S. 178, 201 (1957). See *Barenblatt v. United States*, 360 U.S. 109 (1959); *United States v. Rumely*, 345 U.S. 41 (1953).

1818. Several early cases disallowed agency investigations exceeding the bounds of congressional authorities. See, e.g., *Harriman v. ICC*, 211 U.S. 407 (1908); *United States v. Louisville & N. R.R.*, 236 U.S. 318 (1915); *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924). See *Mechem, Fishing Expeditions by Commissions*, 22 MICH. L. REV. 765 (1924).

1819. *Watkins v. United States*, 354 U.S. 178, 214-15 (1957).

quiries:¹⁸²⁰ because a witness can object to questions on pertinancy grounds, fundamental fairness requires that he not be placed in jeopardy of a contempt citation without being afforded the opportunity to judge for himself the question's pertinancy.

The executive branch's power to investigate is similarly expansive, derived principally from the President's authority to "take Care that the Laws be faithfully executed."¹⁸²¹ The scope of the President's investigatory power under this provision, while not yet tested in the courts,¹⁸²² is presumably limited only by the same purpose and pertinancy requirements that limit congressional investigations.¹⁸²³ Because of the myriad laws to enforce, however, these requirements are only minor restrictions. This power to investigate is apparently subject to narrowing by Congress since Congress can revoke any law it enacts and can presumably, therefore, revoke executive power to collect information necessary to enforce any law.¹⁸²⁴

2. *The Constitutional Right of Disclosural Privacy*

In interpreting certain provisions of the Bill of Rights to protect the individual from governmental intrusions, the Supreme Court has spoken broadly of a right of privacy. Although there is no explicit constitutional recognition of such a right, the Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."¹⁸²⁵ A right of privacy has been found in the fourth amendment,¹⁸²⁶ the first amendment,¹⁸²⁷ penumbras emanating from the first eight amend-

1820. See, e.g., *Watkins v. United States*, 354 U.S. 178 (1957). See also *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). But see *Uphaus v. Wyman*, 360 U.S. 72 (1959).

1821. U.S. CONST. art. II, § 3. The power to investigate may also be implied from other constitutionally enumerated powers of the President, such as the power of pardon granted in U.S. CONST. art. II, § 2.

1822. In *Laird v. Tatum*, 408 U.S. 1 (1972), the plaintiffs challenged an Army civilian-surveillance program used to gather information allegedly necessary to an intelligent use of force in cases of civil disorder. The Court, holding the case nonjusticiable because the record showed no objective harm, noted that "it is significant that the principle sources of information were the news media and publications in general circulation." 408 U.S. at 6. This statement implies that the executive's use of the investigative power does not clearly controvert plaintiff's rights so long as the information was already public. The concept of "public facts" is rooted in the common law of privacy. See text at notes 1584-90 *supra*.

1823. See text at notes 1804-20 *supra*.

1824. The limitations on the manner in which the executive can collect information imposed by statutes such as the Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. §§ 2511, 2516-18 (1970), evidence the truth of this proposition.

1825. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

1826. See *Katz v. United States*, 389 U.S. 347 (1967).

1827. See *Stanley v. Georgia*, 394 U.S. 557 (1969); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Watkins v. United States*, 354 U.S. 178 (1957).

ments,¹⁸²⁸ the ninth amendment,¹⁸²⁹ and the concept of ordered liberty guaranteed by the due process clauses of the fifth and fourteenth amendments.¹⁸³⁰ Significantly, in discussing the right of privacy, the Court has not distinguished between disclosural privacy—the right to control the flow of information concerning the details of one's individuality¹⁸³¹—and that aspect of privacy concerning the individual's ability to decide whether to perform certain acts or to undergo certain experiences, an aspect accurately characterized as privacy relating to personal autonomy.¹⁸³² Many of these cases, especially the "privacy cases,"¹⁸³³ have focused on the privacy of autonomy. It is the purpose of this section to analyze the degree of protection for disclosural privacy offered by each of the constitutional sources of privacy protection,¹⁸³⁴ to determine whether these separate protections are capable of being generalized into a unitary right of disclosural privacy, and to ascertain when government interests in information acquisition, retention, and dissemination will override individual privacy interests.

Except for the third amendment's ban on the quartering of soldiers in any house without the owner's consent in times of peace—a very narrow prohibition—the fourth amendment comes closer to mentioning a right of privacy than any other provision of the Con-

1828. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

1829. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

1830. See *Roe v. Wade*, 410 U.S. 113 (1973). See also, Beane, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212.

1831. See text at note 1525 *supra*. Note that the term "privacy" as defined here is not necessarily the same as the right that is protected at common law. See text at notes 1562-625 *supra*.

1832. Compare *Katz v. United States*, 389 U.S. 347 (1967) (disclosure), with *Roe v. Wade*, 410 U.S. 113 (1973) (autonomy). For a discussion of the disclosure-autonomy distinction see Beardsley, *Privacy: Autonomy and Selective Disclosure*, in *PRIVACY* 56 (J. Pennock & J. Chapman eds. 1971). See also Greenawalt, *The Right of Privacy*, in *THE RIGHTS OF AMERICANS* 299 (N. Dorsen ed. 1971); Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34 (1967); Note, *supra* note 1720; Note, *Roe and Paris: Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161 (1974).

1833. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). See text at notes 1877-902 *infra*.

1834. The fifth amendment privilege against self-incrimination does deal with an individual's interest in disclosural privacy, cf. *Boyd v. United States*, 116 U.S. 616 (1886); *Mapp v. Ohio*, 367 U.S. 643, 661-65 (1961) (Black, J., concurring), but the privacy protection afforded by that amendment is minimal because incriminating testimony can be compelled if either use or transactional immunity from prosecution is conferred on the witness. See *Kastigar v. United States*, 406 U.S. 441 (1972); *Zicarelli v. State Commn. of Investigation*, 406 U.S. 472 (1972). The fifth amendment privilege against self-incrimination also does not apply to the compelled production of privately held but legally required records. *Wilson v. United States*, 221 U.S. 361, 380 (1911). Nor does the privilege apply "to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation . . ." *Wilson v. United States*, 221 U.S. 361, 380 (1911). See also *Davis v. United States*, 328 U.S. 582 (1946).

stitution.¹⁸³⁵ An examination of some of the principal search and seizure cases suggests a broad concern for privacy underlying the fourth amendment. For example, in *Boyd v. United States*¹⁸³⁶ the Court struck down a statute empowering a court to require a defendant to produce personal papers; it reasoned that the essence of an unreasonable search and seizure is "not the breaking of his doors, and the rummaging of his drawers, . . . but . . . the invasion of his indefeasible right of personal security, personal liberty and private property . . ."¹⁸³⁷ In holding that the fourth amendment limits the compulsory production of evidence in addition to prohibiting unlawful searches,¹⁸³⁸ the Court provided protection for a privacy concept broad enough to include both disclosure and autonomy.¹⁸³⁹

In *Olmstead v. United States*,¹⁸⁴⁰ the Supreme Court retreated from the broad formulation of *Boyd* to a mechanistic interpretation of the fourth amendment by sanctioning a home telephone tap that did not constitute a technical trespass. Chief Justice Taft, writing for the Court, interpreted the fourth amendment as forbidding only "an actual physical invasion of [one's] house."¹⁸⁴¹ By emphasizing the manner rather than the effect of the invasion, the holding narrowed the concept of privacy underlying the fourth amendment. In

1835. The fourth amendment to the Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." See generally A. AMSTERDAM, *FEDERAL CONSTITUTIONAL RESTRAINTS ON SEARCH, SEIZURE, ARREST, DETENTION AND INTERROGATION BY STATE LAW ENFORCEMENT OFFICERS* (1966); P. GAY, *THE POLICEMAN AND THE ACCUSED* (1965); L. KOLBREK & G. PORTER, *THE LAW OF ARREST, SEARCH, AND SEIZURE* (1965); N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Note, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J. L. REF. 154 (1972).

1836. 116 U.S. 616 (1886).

1837. 116 U.S. at 630.

1838. See, e.g., *Gouled v. United States*, 255 U.S. 298 (1921); *Ex parte Jackson*, 96 U.S. 727 (1878). But cf. *Carroll v. United States*, 267 U.S. 132 (1925).

1839. *Boyd* demonstrates that the fourth amendment serves two purposes: the protection of individual privacy and the protection of the individual against the compulsory production of evidence to be used against him, as well as against unlawful searches. See *Davis v. United States*, 328 U.S. 582, 587 (1946). Based on this dual purpose analysis, one could argue that the "right to be let alone" attaches only in a criminal context, since, as the Court noted in *Boyd*, the fourth and fifth amendments "run almost into each other." 116 U.S. at 630. However, the inference that privacy is fully protected by the fourth amendment only when the individual is suspected of criminal activity was rejected by the Court in *Camara v. Municipal Court*, 387 U.S. 523 (1967).

1840. 277 U.S. 438 (1928). Cf. *Silverman v. United States*, 365 U.S. 505 (1961) (slight physical penetration of premises by a spike microphone constitutes a technical trespass and, if made without a warrant, is an illegal search).

1841. 277 U.S. at 466.

an often-quoted dissent, Justice Brandeis adhered to the broader view:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.¹⁸⁴²

One author interpreted Justice Brandeis' construction of the fourth amendment to require that "all government intrusions on a person's privacy at home, in his papers and effects, and on his free movement would have . . . to be justified, with the government forced to bear the burden of showing why a particular form of interference was reasonable. Privacy, though not absolute, would have a high place in the hierarchy of protected values."¹⁸⁴³

In *Katz v. United States*,¹⁸⁴⁴ the Court returned to a more expansive view of the fourth amendment by excluding evidence obtained by the use of an electronic listening and recording device attached to the outside of a public phone booth. Abandoning the *Olmstead* trespass doctrine,¹⁸⁴⁵ the Court based its decision on the sweeping proposition that "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."¹⁸⁴⁶ The fourth amendment applied in this instance, the Court stated, because the defendants had "justifiably relied"¹⁸⁴⁷ upon the privacy afforded by the public phone booth. In his concurrence, Justice Harlan understood the Court's holding to require

first that a person have exhibited an actual (subjective) expectation

1842. 277 U.S. at 478.

1843. Beane, *supra* note 1830, at 227.

1844. 389 U.S. 347 (1967).

1845. 389 U.S. at 353. The Court refused to overrule *Olmstead* expressly, but Justice Harlan, concurring, felt that *Olmstead*, "which essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment" had been overruled. 389 U.S. at 362 n.*.

1846. 389 U.S. at 351-52.

1847. 389 U.S. at 353.

of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.¹⁸⁴⁸

While the *Katz* view of the privacy concept underlying the fourth amendment goes only to disclosure and not to autonomy, and is therefore not as broad as the implications of *Boyd*, the decision suggests that the fourth amendment—equally applicable in the non-criminal context¹⁸⁴⁹—gives rise to a zone of privacy adhering to the individual,¹⁸⁵⁰ at times even in situations outside the home.¹⁸⁵¹ Because the test turns on what society deems a reasonable expectation of privacy, the individual of course receives more protection within his home than without, in accordance with the common law prior to the Constitution.¹⁸⁵² But, while applicable in a broad range of contexts, this fourth amendment right of disclosural privacy affords minimal protection because it must yield in the face of reasonable government intrusion. While the fourth amendment has been interpreted to require probable cause or a warrant for searches in the criminal context¹⁸⁵³ and in administrative searches involving physical intrusions by government agents into the home,¹⁸⁵⁴ it is satisfied in the case of questionnaires if the information sought is "reasonably

1848. 389 U.S. at 361.

1849. See *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Frank v. Maryland*, 359 U.S. 360, 377 (1959) (Douglas, J., dissenting).

1850. The notion of a "zone of privacy" outside the home was apparently rejected in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973). However, unlike *Katz*, which was a disclosure case, *Paris* involved the privacy of autonomy. Petitioners in *Paris* had been enjoined by the Georgia supreme court from exhibiting two allegedly obscene films. They argued that the constitutional doctrine of privacy laid down in *Stanley v. Georgia*, 394 U.S. 557 (1969), where the Court held that the possession of obscene materials in the home was beyond the reach of the state's criminal law because the Constitution protected the right to receive information and ideas and to be generally free from government intrusion, applied outside the home as well. The Court rejected this extension of *Stanley*, holding that the privacy of the home could not be equated with a general zone of privacy that follows a consumer of obscene materials wherever he goes. 413 U.S. at 66. These cases indicate that certain aspects of privacy of autonomy, while protected inside the home, are not necessarily protected outside the home. The privacy of disclosure, however, is oriented to the person, not to the place, and thus should follow the individual wherever he may be. Thus, *Paris* should not be interpreted as rejecting the zone of privacy notion with respect to disclosure.

1851. See *Katz v. United States*, 389 U.S. 347, 351 (1967).

1852. See Barrett, *Personal Rights, Property Rights and the Fourth Amendment*, 1960 SUP. CR. REV. 46.

1853. See *United States v. United States District Court*, 407 U.S. 297, 323 (1972); *Chimel v. California*, 395 U.S. 752, 762-64 (1969).

1854. See *Camara v. Municipal Court*, 387 U.S. 523 (1967).

related to governmental purposes and functions.”¹⁸⁵⁵ Under this test, census questionnaires have been sustained,¹⁸⁵⁶ despite the wide scope of census questions.¹⁸⁵⁷ Moreover, witnesses subpoenaed by grand juries cannot challenge information requests by alleging that the grand jury lacked any reasonable ground for suspecting any criminal violations,¹⁸⁵⁸ nor can they object to questions on relevance grounds.¹⁸⁵⁹ In sum, fourth amendment privacy poses at most a minor barrier to government collection of information from the population at large.

A line of cases beginning in the 1950's suggests that the first amendment is a source of a right of disclosural privacy.¹⁸⁶⁰ Many of these cases involved legislative investigations conducted by the House Un-American Activities Committee, or by similarly purposed state committees. The controversies arose when witnesses before the committees refused to answer questions concerning the association of other individuals with the Communist Party on the basis that the first amendment barred the committee from forcing such disclosure.¹⁸⁶¹ The Court concluded that “privacy of association” was a necessary concomitant to first amendment freedoms, that forced disclosure would abridge those freedoms, and that to justify such an abridgement a state must “convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.”¹⁸⁶² Other related cases have similarly made clear that a state's power to make inquiries about a person's beliefs or associations is limited by the first amendment.¹⁸⁶³ In the areas of public employment¹⁸⁶⁴ and bar admission¹⁸⁶⁵ in particular the Court has disallowed broad sweeping inquiries for purposes of determining

1855. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

1856. *See United States v. Rickenbacker*, 309 F.2d 462, 463 (2d Cir. 1962), *cert. denied*, 371 U.S. 962 (1963).

1857. *See* text at notes 1925-38 *infra*; notes 1990-93 *infra* and accompanying text.

1858. *Hale v. Henkel*, 201 U.S. 43 (1906); *Levinson v. Attorney General*, 321 F. Supp. 984 (E.D. Pa. 1970). *See generally* *United States v. Calandra*, 414 U.S. 338 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

1859. *Blair v. United States*, 250 U.S. 273 (1919). *See also* *United States v. Girgenti*, 197 F.2d 218 (3d Cir. 1952).

1860. *See, e.g., Barenblatt v. United States*, 360 U.S. 109 (1959). *See also* *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

1861. The issue in these cases was not whether the committees had the inherent investigative power to require answers but whether the Bill of Rights served as a limitation on the inherent investigative power. *See, e.g., Barenblatt v. United States*, 360 U.S. 109, 114 n.2 (1959); *Uphaus v. Wyman*, 360 U.S. 72, 75 (1959).

1862. *Gibson v. Florida Legislative Investigation Commn.*, 372 U.S. 539, 546 (1962).

1863. *See, e.g., Baird v. State Bar*, 401 U.S. 1, 6 (1971).

1864. *See, e.g., Keyshian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Shelton v. Tucker*, 364 U.S. 479 (1960).

1865. *See, e.g., In re Stolar*, 401 U.S. 23 (1971); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971).

fitness that discourage the exercise of first amendment rights. Thus, although these cases have focused on the "chilling effect" that disclosure would have on the exercise of first amendment freedoms,¹⁸⁶⁶ they clearly hold that the first amendment protects disclosural privacy interests and lend at least some support for the construction of a right of disclosural privacy.

There are, however, two limitations on the general rule that governments cannot violate constitutional rights when acquiring information¹⁸⁶⁷ that may restrict an individual's ability to assert a first amendment privacy right as a defense to a governmental demand for information. First, recipients of information requests generally are unable to assert by way of defense violations of the constitutional rights of third parties,¹⁸⁶⁸ at least where no injury in fact is demonstrated by the recipient.¹⁸⁶⁹ This bar on the assertion of constitutional *jus tertii* has many exceptions, however, and in recent years it has been honored mostly in the breach.¹⁸⁷⁰ Thus, in *NAACP v. Alabama*¹⁸⁷¹ the NAACP was allowed to assert the first amendment rights of its members in response to a state request for its membership list. Similarly, in *Griswold v. Connecticut*¹⁸⁷² a doctor and a birth control official were permitted to assert the privacy rights of the recipients of contraceptives as a defense to criminal charges of aiding and abetting the use of birth control devices. Second, as pointed out in *Eastland v. United States Servicemen's Fund*,¹⁸⁷³ the speech and debate clause limits the ability to raise constitutional defenses in response to requests for information from members of Congress or their aides. In *Eastland*, the plaintiff organization sought to enjoin implementation of a congressional subpoena *duces tecum* that directed a bank to produce the organization's bank records and alleged that compliance with the subpoena would violate the organization's first amendment rights. Had the subpoena been issued directly to the organization, it could have resisted and tested the subpoena in a

1866. *But see* Gibson v. Florida Legislative Investigation Commn., 372 U.S. 539, 565, 570 (1963) (Douglas, J., concurring). *See also* Beane, *supra* note 1830.

1867. *See* Watkins v. United States, 354 U.S. 178, 188 (1957). *See also* Barenblatt v. United States, 360 U.S. 109 (1959). It is interesting to note that the early cases, e.g., McGrain v. Daugherty, 273 U.S. 135, 173 (1927); Kilbourn v. Thompson, 103 U.S. 168, 190 (1880), which limited the scope of the investigative power by inherent purpose and pertinency requirements rather than by the Bill of Rights, were motivated at least in part by a desire to protect a citizen's "private affairs."

1868. *See, e.g.,* Village of Belle Terre v. Boraas, 416 U.S. 1, 10-11 (1974) (Brennan, J., dissenting); Eisenstadt v. Baird, 405 U.S. 438, 443-46 (1972); Tileston v. Ullman, 318 U.S. 44 (1943) (*per curiam*).

1869. *See* Note, *Standing To Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 428-31 (1974).

1870. *See* Note, *supra* note 1869, at 423 n.3 (citing cases).

1871. 357 U.S. 449 (1958).

1872. 381 U.S. 479 (1965).

1873. 43 U.S.L.W. 4635 (U.S. May 27, 1975).

contempt proceeding.¹⁸⁷⁴ In this context, however, the speech and debate clause limited the scope of the inquiry to whether the congressional act was within the sphere of legislative activity.¹⁸⁷⁵ While significant, the restriction on the assertion of constitutional rights resulting from the speech and debate clause is of limited force: it arises only at the federal government level when information is requested of third parties by members of Congress or by congressional aides carrying out legislative tasks.¹⁸⁷⁶

The final three possible constitutional bases for a right to privacy—the penumbras emanating from the first eight amendments, the ninth amendment, and the concept of ordered liberty guaranteed by the due process clauses of the fifth and fourteenth amendments—have been explored collectively in a series of cases dealing with the privacy of autonomy. In *Griswold v. Connecticut*,¹⁸⁷⁷ the Court struck down statutes prohibiting the prescription or use of contraceptives in so far as the statutes related to married couples. Six justices, in three opinions, found an independent right of privacy, although they could not agree on its source. Justice Douglas, writing for the Court, advanced the penumbra theory.¹⁸⁷⁸ He attempted to demonstrate that the Bill of Rights applies to the states through the due process clause of the fourteenth amendment and protects the right of marital privacy by arguing that the specific guarantees of the first eight amendments give rise to “peripheral rights”¹⁸⁷⁹ without which the specific rights would be less secure. Thus, he asserted that the first amendment, whose penumbra includes associational privacy, the third amendment, which prohibits quartering soldiers in any house in time of peace without the owners’ consent, the fourth amendment, which protects against unreasonable search and seizure, and the fifth amendment, which protects the citizen against self-incrimination, when taken together give rise to “zones of privacy.”¹⁸⁸⁰

Rejecting the penumbra approach, Justice Harlan considered the right of privacy so fundamental that it was “implicit in the concept of ordered liberty” and hence protected by due process.¹⁸⁸¹ Justice Harlan had previously advanced the fundamental rights ap-

1874. 43 U.S.L.W. at 4638 n.14, 4641 n.16.

1875. 43 U.S.L.W. at 4638.

1876. The concurring opinion in *Eastland* by Justices Marshall, Brennan, and Stewart suggested that the plaintiff organization could have raised its constitutional rights by employing a different procedure with different parties defendant: “Our prior cases arising under the Speech and Debate Clause indicate only that a Member of Congress or his aide may not be called upon to defend a subpoena against constitutional objection, and not that the objection will not be heard at all.” 43 U.S.L.W. at 4643.

1877. 381 U.S. 479 (1965).

1878. 381 U.S. at 484.

1879. 381 U.S. at 483.

1880. 381 U.S. at 484.

1881. 381 U.S. at 500.

proach to privacy in *Poe v. Ullman*,¹⁸⁸² where he stated that "it is not the particular enumeration of rights in the first eight Amendments which spell out the reach of Fourteenth Amendment due process, but rather . . . those concepts which are considered to embrace those rights 'which are . . . *fundamental*; which belong . . . to the citizens of all free governments.'" ¹⁸⁸³ This approach apparently was also adopted by Justice Goldberg, even though he joined in the Court's opinion and stated that he was adding his own opinion merely to "emphasize the relevance of [the ninth] Amendment." Justice Goldberg argued that the ninth amendment "shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."¹⁸⁸⁴ One must look, he stated, to the "'traditions and [collective] conscience of our people to determine whether a principle is so rooted [there] . . . as to be ranked as fundamental.'" ¹⁸⁸⁵ The right of privacy in Justice Goldberg's view was just such a fundamental personal right, which emanated "from the totality of the constitutional scheme under which we live."¹⁸⁸⁶

The debate over the constitutional source of the right of privacy apparently was settled in *Roe v. Wade*,¹⁸⁸⁷ in which the Court upheld a woman's absolute right to have an abortion in the first trimester of pregnancy. This holding struck down a state statute making abortions illegal except where the mother's life is endangered.¹⁸⁸⁸ Adopting the fundamental rights approach, the Court held that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state actions, as we feel it is, or, as the district court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to en-

1882. 367 U.S. 497, 539-45 (1961) (Harlan, J., dissenting).

1883. 367 U.S. at 497. Justice White, concurring in *Griswold*, also found justification in the liberty guaranteed by the fourteenth amendment, but he refused to recognize that this liberty gave rise to an independent right of privacy. See 381 U.S. at 502-07. Justices Black and Stewart dissented on the ground that the fourteenth amendment makes applicable to the states no rights beyond those specifically incorporated in the first ten amendments. See 381 U.S. at 507-31.

1884. 381 U.S. at 492.

1885. 381 U.S. at 493 (brackets in original), quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

1886. 381 U.S. at 494, quoting *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting).

1887. 410 U.S. 113 (1973). See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973).

1888. The Court did, however, reverse the district court's decision to the extent that it had held that this right of privacy was unqualified, holding instead that the state's interest in protecting the potentiality of human life in the second and third trimesters of pregnancy was sufficiently strong to permit some regulation of abortion. See 410 U.S. at 154.

compass a woman's decision whether or not to terminate her pregnancy."¹⁸⁸⁹ Because the plaintiff in *Roe v. Wade* was an unmarried woman,¹⁸⁹⁰ the holding affirms that the right of privacy attaches to the individual and is not restricted to the marital relationship. There are at least two reasons that may explain why the Court settled on the fundamental rights approach. First, the composition of the Court had changed drastically. Of the five justices who joined the majority in *Griswold*, only Justices Douglas and Brennan remained; additionally, both Justices Black and Harlan had departed. Second, the Court could have found the penumbra theory unmanageable because it opened up so much uncharted ground. The fundamental rights approach has been a traditional one¹⁸⁹¹ and, because of the amorphous quality of the "liberty" concept, the approach is no less open to expansion than the penumbral argument.

One other Supreme Court case, *Stanley v. Georgia*,¹⁸⁹² expanded the privacy concept to include the right to possess obscene materials in one's home. While the Court ostensibly based its holding on the first amendment, the decision drew in part upon a "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."¹⁸⁹³ The privacy underpinning in *Stanley* was clearly significant, because the case is difficult to reconcile with other cases holding that the first amendment does not apply to obscenity,¹⁸⁹⁴ and because the right recognized in *Stanley* is limited to the house,¹⁸⁹⁵ unlike most first amendment

1889. 410 U.S. at 153.

1890. 410 U.S. at 120.

1891. As early as *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court recognized certain "fundamental" rights that would be protected despite their lack of explicit recognition in the Constitution. In subsequent cases, the Court recognized as fundamental rights included in the liberty clause of the fifth and fourteenth amendments the personal intimacies of the home, the family, procreation, motherhood, marriage, and child rearing. Cf. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). See also *Village of Belle Terre v. Boraas*, 416 U.S. 1, 12 (1974) (Marshall, J., dissenting), in which Justice Marshall stated that the right of privacy should extend to the selection of living companions: "The choice of household companions—of whether a person's 'intellectual and emotional needs' are best met by living with family, friends, professional associates or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution." 416 U.S. at 16. If these rights apply to the states through the due process clause of the fourteenth amendment, one may also find a right of privacy either in that same clause or in the liberty clause of the fifth amendment applying to the federal government.

1892. 394 U.S. 557 (1969).

1893. 394 U.S. at 564.

1894. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973); *Miller v. California*, 413 U.S. 15, 23-25 (1973); *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972); *Roth v. United States*, 354 U.S. 476, 485 (1957).

1895. See 394 U.S. at 558.

rights. Moreover, the Court cited *Griswold* in addition to first amendment cases to support the proposition that "the right to receive information and ideas" is "fundamental to our free society."¹⁸⁹⁶ In short, the Court apparently relied on first amendment considerations to justify expanding the incipient privacy right.

The contours of the privacy right developed by these cases seem extraordinarily difficult to determine, for the activities it has been invoked to protect lack a clear interrelationship. The Court often speaks of privacy as if it were a single right, but it seems more accurate to conceive of privacy as that characteristic common to those individual actions that the Court has been willing to recognize as fundamental rights. Thus, the Court has stated that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy."¹⁸⁹⁷ It is clear that not all fundamental rights fall within the ambit of the privacy right, but an underpinning of strong privacy interests seems to enhance the possibility that a particular right will be deemed fundamental. The actions protected thus far in the name of privacy relate to the home,¹⁸⁹⁸ the family,¹⁸⁹⁹ and individual sexuality.¹⁹⁰⁰ The Court seems to be guided by its perception of activities that society views as private and that are thus not fit subjects for government regulation.¹⁹⁰¹ But it is not at all clear what other actions popularly considered private will receive constitutional protection.¹⁹⁰²

The above-discussed privacy cases involve autonomy, not disclosure. A right of disclosural privacy, however, can be derived from the fundamental privacy rights by analogy to the first amendment right of disclosural privacy: Disclosure of information relating to an individual's participation in particular activities may deter an individual from engaging in those activities. Where the activities have the status of fundamental rights, any such deterrent effect would be an impermissible "chill." But the disclosural privacy right derived

1896. 394 U.S. at 564.

1897. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

1898. *See Stanley v. Georgia*, 394 U.S. 557 (1969). *See also Village of Belle Terre v. Boraas*, 416 U.S. 1, 12 (1974) (Marshall, J., dissenting).

1899. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *State v. Elliott*, 44 U.S.L.W. 2044 (N.M. Ct. App. July 9, 1975).

1900. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Population Servs. Intl. v. Wilson*, 44 U.S.L.W. 2033 (S.D.N.Y. July 2, 1975).

1901. *See, e.g., Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

1902. *See generally* Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974); Note, *supra* note 1720.

A few state courts, interpreting the federal Constitution have extended the right of privacy to other areas. *See Davidson v. Dill*, 180 Colo. 123, 128, 503 P.2d 157, 161 (1972); *Eddy v. Moore*, 5 Wash. App. 334, —, 487 P.2d 211, 217-18 (1971) (arrest records); *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 266-68, 466 P.2d 225, 230-32, 85 Cal. Rptr. 1, 6-8 (1970) (financial disclosures by public officials).

from the privacy cases arguably should go beyond those situations in which a chilling effect can be shown. For example, requiring disclosure of the reasons why a woman decides to have an abortion may not deter the exercise of this fundamental right because the consequences of having an unwanted child are so enormous. Nevertheless, this information seems so private that the government should not in most instances be able to require its disclosure. The same high regard for privacy that led the Court to conclude that government regulation of abortions is improper, at least in the first trimester, should mandate disclosural privacy with regard to information concerning abortions in the first trimester. In situations where the state's regulatory purposes are outweighed by a concern for individual privacy, the state should be unable to investigate, even for a tangentially related purpose such as public health, without showing a very strong interest. Thus, with regard to information relating to contraception, the bearing and rearing of children, private obscenity, and any other activities recognized as fundamental privacy rights, it can be argued that there is a corresponding fundamental right of disclosural privacy, although no case to date has so held.¹⁹⁰³ While the right of disclosural privacy derived in this manner from fundamental rights would not be as broad as the disclosural privacy right inferred from the fourth amendment, its exceptions would be more restricted. A state infringement of fundamental rights can only be justified by a compelling state interest¹⁹⁰⁴ and the infringing legislation "must be narrowly drawn to express only the legitimate state interests at stake."¹⁹⁰⁵ Thus it seems possible to develop a right of disclosural privacy offering more protection than the broad but low walls of the fourth amendment.

1903. *But cf.* *Roe v. Ingraham*, 480 F.2d 102 (2d Cir.), *on remand*, 364 F. Supp. 536 (S.D.N.Y. 1973); *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973).

The Supreme Court bypassed an opportunity to discuss this issue in *Roe v. Norton*, 43 U.S.L.W. 4874 (U.S. June 24, 1975), which involved a challenge to a state statute providing criminal sanctions for mothers of illegitimate children receiving AFDC assistance who refused to divulge the name of the putative father of the child. A three-judge district court had upheld the statute against claims of denial of due process and equal protection and invasion of right to privacy, and the Supreme Court granted certiorari. The Social Security Act was amended in the interim, however, and the case was remanded for reconsideration in light of that development.

On the state level, the New York supreme court, in *Schulman v. New York City Health & Hospitals Corp.*, 70 Misc. 2d 1093, 335 N.Y.S.2d 343 (1972), *vacated and remanded*, 41 App. Div. 2d 714, 341 N.Y.S.2d 242, *judgment reinstated*, 75 Misc. 2d 150, 346 N.Y.S.2d 920 (Sup. Ct. 1973), *rev'd.*, 44 App. Div. 2d 482, 355 N.Y.S.2d 781 (1974), found that a state law requiring disclosure of the name and address of abortion patients was void because it violated the patient's constitutional right to privacy. In reversing, the Appellate Division relied on its finding that there was "a sufficient compelling state interest . . . to justify limiting the fundamental right of privacy asserted . . ." 44 App. Div. 2d at —, 355 N.Y.S.2d at 785. *See generally* Note, *supra* note 1720, at 770-72.

1904. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

1905. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

It would be somewhat misleading to treat disclosural privacy as a unitary right, because it is derived from dissimilar freedoms of action guaranteed by the first and fourth amendments and by the due process clauses of the fifth and fourteenth amendments. One particular distinction is that the disclosural privacies implied from the fundamental rights of autonomous privacy depend much more on a notion that disclosure would be offensive to societal norms than do the disclosural privacy rights inferred from the first amendment. In addition, first amendment disclosural rights require the demonstration of a chilling effect on the freedom of association or speech, while the other disclosural privacy rights arguably exist independent of any chilling effect. Nevertheless, the disclosural privacy rights probably have enough similarities to make it convenient to speak of them as one class of rights.

One principal similarity among the disclosural privacy rights is the standard the government must meet to justify an infringement. In all cases the state must show a compelling state interest,¹⁹⁰⁶ a very heavy burden. Even this standard has been viewed as a balancing test,¹⁹⁰⁷ however, and it is possible to argue that the individual's disclosural privacy interest is not entitled to as much weight as the individual's interest in exercising the underlying first or fourth amendment rights or privacy rights of autonomy. The individual's right to act is arguably more important than his right not to disclose what he does. For example, it seems more important to protect the decision whether to bear a child than to protect the woman's right to disclose that decision.

The application of this compelling state interest standard may yield results that are varying and difficult to predict. Because disclosural privacy rights are derived from other constitutional rights, the weight of each disclosural right may vary according to the weight of the underlying right. It has been maintained, for example, that the first amendment rights are entitled to a special degree of protection.¹⁹⁰⁸ On the other side, the force of the government's interest in

1906. Several state courts have found a compelling state interest sufficient to override the privacy right. See *Atchison, T. & S.F. Ry. v. Lopez*, — Kan. —, —, 531 P.2d 455, 467 (1975) (state's interest in preventing employment discrimination justified release of arrest and conviction records to state civil rights commission); *Schulman v. New York City Health & Hospitals Corp.*, 44 App. Div. 2d 482, —, 355 N.Y.S.2d 782, 785 (1975) (state's interest in regulating abortions justified disclosure of abortion patient's name and address to Board of Health). But see *Eddy v. Moore*, 5 Wash. App. 334, —, 487 P.2d 211, 217-18 (1971) (state did not show a compelling state interest in retaining arrest records of acquitted persons).

1907. Cf. Note, *Reaffirming the Freedom of the Press: Another Look at Miami Herald Publishing Co. v. Tornillo*, 73 MICH. L. REV. 186, 199 (1974); Note, *Salyer Land Co. v. Tulare Lake Basin Water Storage District: Opening the Floodgates in Local Special Government Elections*, 72 MICH. L. REV. 837 (1974).

1908. See *New York Times v. Sullivan*, 376 U.S. 254, 269-72 (1964); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638-42 (1943); *Whitney v. California*, 274

disclosure may depend upon the source of the governmental investigative power being invoked. For example, the congressional investigative power implied from the impeachment function may present a stronger governmental interest than the investigative power implied from the legislative function. In an investigation under the impeachment function, the integrity of the institutions of government are involved, while in an investigation under the legislative function, only the ability to pass a specific piece of legislation is at stake. Although the legislative investigatory power is important, it is arguably less compelling than that implied from the impeachment function.

Even if courts are willing to recognize as extensive a disclosural privacy right as advocated above, there remains a need for legislative action if individuals are to be protected adequately from intrusive government information acquisition. One reason is that the balancing test gives little guidance concerning the proper limits of government intrusion into individual privacy, for the test leaves a judge free to apply his own value judgments in assessing competing state and individual interests in a particular case. A second reason is that because the right of disclosural privacy draws its strength from specific provisions of the Bill of Rights, it may be difficult to expand that right beyond matters relating to first amendment freedoms, sexual relations, the family, and the home. In any case, greater detail and flexibility in the protection of privacy interests can be accomplished legislatively. Moreover, a societal reassessment of conflicting interests is easier to implement when the original balance is struck legislatively than when the balance is accorded a constitutional dimension and is thus not within the legislature's power to change.

In addition to the need for legislative control of information acquisition, there is need for legislation in the areas of information retention and dissemination if the individual privacy interests at stake are to be adequately protected. The implications of the privacy right for these other aspects of information-handling are limited. In particular, simple retention of such information does not appear to represent any further infringement of the constitutional right. But in many instances, on a policy level, the government's desire to retain collected information indefinitely will not justify the resulting injury to individual privacy interests.

To be sure, in some areas the retention of information about an individual may continue to serve a purpose, at least as long as the individual is alive. Criminal conviction records, for example, are used as an important tool for sentencing after subsequent convictions.

U.S. 357, 373-78 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 628-31 (1919) (Holmes & Brandeis, JJ., dissenting). *But see* *Kovacs v. Cooper*, 336 U.S. 77, 90-97 (1949) (Frankfurter, J., concurring).

Even where the purpose for which the information was collected can no longer be served, the government may nevertheless legitimately desire to retain the information in order to avoid the burden of having to recollect it, should it ever be needed again. The principal problem encountered with record retention is the possibility of disclosure, either intentional or inadvertent, to other persons or agencies of personal information traceable to specific individuals.¹⁹⁰⁹ This danger appeared so substantial to the court in *Menard v. Mitchell*¹⁹¹⁰ that it viewed an order to expunge FBI records concerning an illegal arrest as a proper means of preventing inadvertent disclosure. The court stated that "if appellant can show that his arrest was not based on probable cause it is difficult to find constitutional justification for its memorialization in the FBI's criminal files,"¹⁹¹¹ especially because dissemination of that information might subject the appellant's reputation to substantial injury.¹⁹¹²

While legislation is needed, it is arguable that the right of disclosural privacy protects against the possibility that information may be accidentally revealed.¹⁹¹³ If the government can assure confidentiality, there seems to be no constitutional requirement for disposal of information validly acquired. Moreover, dissemination by the collecting agency to other federal agencies of personally identifiable information would be permissible where the other agencies can show a need that is sufficiently compelling to justify collecting the information from the source itself. But, arguably, the right of disclosural privacy is violated unless each new governmental unit can satisfy such a test and unless the subject is given timely notice of any attempt at intra-governmental transfer: The agency from which the information is sought cannot be expected to assert satisfactorily the subject's rights. For the same reason, the collecting agency should have to make a new showing of need sufficient to justify collecting the in-

1909. See, e.g., A. MILLER, *supra* note 1503. But cf. DATABANKS, *supra* note 1502. Proposals for a national data center have been criticized extensively because of confidentiality problems. See, e.g., A. MILLER, *supra*; Note, *Privacy and Efficient Government: Proposals for a National Data Center*, 82 HARV. L. REV. 400 (1968); notes 2100-04 *infra* and accompanying text.

1910. 430 F.2d 486 (D.C. Cir. 1970). On remand, 328 F. Supp. 718 (D.D.C. 1971), however, the district court declined to order expungement and instead enjoined disclosure of the records to prospective employees other than agencies of the government, 328 F. Supp. at 728. On appeal from this district court refusal to expunge, the court of appeals remanded the case with orders "to remove appellant's record from [the] criminal files." *Menard v. Saxbe*, 498 F.2d 1017, 1030 (D.C. Cir. 1974). See also *Tarlton v. Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974); *United States v. Mackey*, 387 F. Supp. 1121 (D. Nev. 1974).

1911. 430 F.2d at 492.

1912. On the problems of confidentiality in this context see Symposium, *Computers, Data Banks, and Individual Privacy*, 53 MINN. L. REV. 211 (1968); Comment, *supra* note 1525.

1913. But cf. *Eddy v. Moore*, 5 Wash. App. —, —, 487 P.2d 211, 218 (1971); *Davidson v. Dill*, 180 Colo. 123, 128, 503 P.2d 157, 162 (1972).

formation before it can use the information for a new purpose. Finally, it is clear that dissemination to individuals or to private organizations without the consent of the person to whom the information pertains¹⁹¹⁴ is unwarranted because private parties can never show the required compelling state interest or national governmental purpose.¹⁹¹⁵

D. Federal Statutory Protection for Privacy Prior to the Privacy Act of 1974

Prior to the Privacy Act of 1974, which is the first congressional effort at comprehensive privacy legislation, Congress attempted to reduce the damage to privacy caused by government data-handling through specific acts dealing with specific types of information. These enactments deal to varying degrees with all five critical problems of a data-gathering system: types of information that can be collected,¹⁹¹⁶ methods of collection,¹⁹¹⁷ retention,¹⁹¹⁸ dissemination,¹⁹¹⁹

1914. But could an individual, in supplying the information to the government in the first place, be deemed to have consented to such dissemination? This is obviously not the case where the individual has objected to governmental collection in the first instance. But where the individual merely provides the requested information without objecting, the question becomes more difficult and depends upon the circumstances surrounding the initial disclosure. There is no reason to suppose that the ordinary common-law consent doctrine would not apply. Under this doctrine, consent may be either express or implied. Consent may be implied from silence only where a reasonable person would speak if he objected. Consent may also be inferred from custom or usage. Consent will be held invalid where it is obtained under situations of duress, where the threat is direct. The privilege is limited to the conduct to which the party actually consents, or to acts of a substantially similar nature. See W. PROSSER, *supra* note 1565, at 101-08. Yet one must consider that a governmental request for information may be inherently coercive. This has led Professor Miller to comment that "[E]ven a questionnaire sent out under the imprimatur of a federal agency has an intimidating effect on some people, a weakness that often is played upon by the agency in its follow-up practices." A. MILLER, *supra* note 1503, at 186.

1915. *But see* Tosh v. Buddies Supermarkets, Inc., 482 F.2d 329, 332 (5th Cir. 1973), holding that no right of privacy was invaded by the release of arrest records to nonlaw-enforcement persons for other than law enforcement purposes when those persons "present a legitimate need for and interest in the material."

1916. See, e.g., Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. §§ 2511, 2516 (Supp. I 1971) (collection of information by interception of oral and wire communications); 28 U.S.C. § 534 (1970) (collection of criminal records by the federal government); 44 U.S.C. § 3505 (1970) (prohibiting federal agencies from collecting information that another agency has already been authorized to obtain); 44 U.S.C. § 3506 (1970) (determination as to the necessity of collection of information by a federal agency upon the objection of a party having a "substantial interest"); 44 U.S.C. § 3509 (1970) (requiring federal agencies to submit comprehensive plans for the collection of information); 44 U.S.C.A. § 3512 (Supp. Feb. 1975) (collection of information by independent regulatory agencies); 44 U.S.C. § 3511 (1970) (imposing penalties upon persons who fail to furnish requested information).

1917. See, e.g., Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. §§ 2511, 2516, 2518 (Supp. I 1971) (permitting the collection of information by interception of wire or oral communications and outlining the authorization procedure for such interceptions); 44 U.S.C. § 3501 (1970) (requiring the minimization of the burden placed on persons compelled to furnish information to federal agencies); 44 U.S.C. § 3505 (1970) (prohibiting multiple collection of information by various agencies).

and remedies for a party injured by unlawful dissemination.¹⁹²⁰ Four major acts that exemplify the types of privacy protection Congress

1918. *See, e.g.*, 28 U.S.C. § 534 (1970) (retention of criminal identification records); Organized Crime Control Act of 1970 § 1001(a), 18 U.S.C. § 3578 (1970) (retention of criminal conviction records). The statutes regulating records-management by the Administrator of General Services are 44 U.S.C. § 2905 (1970) (establishing standards for the retention of records of continuing value); 44 U.S.C. § 2907 (1970) (establishing records storage centers); 44 U.S.C. § 2909 (1970) (allowing the Administrator to authorize the retention of records). The statutes regulating records-management by federal agencies are 44 U.S.C. §§ 3101-07 (1970). Regarding the disposal of records see 44 U.S.C. §§ 3301-14 (1970), especially section 3310, providing for the disposal of records constituting a menace to health, life, or property and section 3314, providing that the procedures for the disposal of records outlined in this chapter are to be exclusive.

1919. Numerous federal statutes regulate disclosures related to personal life. *See, e.g.*, Fair Credit Reporting Act, 15 U.S.C. §§ 1681-81t (1970); 18 U.S.C. § 1905 (1970) (disclosure of confidential information by government employees); 38 U.S.C. § 3301 (1970) (VA records); Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2511 (1970) (general prohibition against disclosure of the contents of intercepted wire and oral communications); 42 U.S.C.A. § 1306 (1974) (disclosure of information in the possession of the Department of Health, Education, and Welfare and the Department of Labor); Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 § 333, 42 U.S.C. § 4582 (1970) (prohibiting the disclosure of the names of individuals who were the subjects of research on alcohol abuse); 28 U.S.C. § 534 (1970) (disclosure of criminal identification information); Organized Crime Control Act of 1970 § 1001(a), 18 U.S.C. § 3578 (1970) (disclosure of criminal conviction records); Postal Reorganization Act § 2, 39 U.S.C. § 410 (1970) (disclosure of information by the Post Office). Other statutes regulate the disclosure of financial and business records. *See, e.g.*, INT. REV. CODE OF 1954, § 6103 (disclosure of tax returns); Federal Trade Commission Act § 6(f), 15 U.S.C. § 46(f) (1970) (disclosure of trade secrets and names of customers); 7 U.S.C. § 608(d) (1970) (disclosure of information under the Agricultural Adjustment Act); Trust Indenture Act of 1939 § 321, 15 U.S.C. § 77uuu (1970) (disclosure of confidential information collected by the SEC). *See* GOVERNMENT DOSSIER, *supra* note 1511, at 26-29. However, provisions allowing the discretionary release of data by high ranking officials are common, thereby significantly lessening the assurance of limited access. *See, e.g.*, 13 U.S.C. § 8(a) (1970) (release of census data by Secretary of Commerce). Other data, the disclosure of which is not specifically restricted by statute, may be declared confidential and its disclosure limited pursuant to regulations promulgated under agency rule-making powers. *See, e.g.*, 32 C.F.R. §§ 1608.1-17 (1974) (Selective Service System records); 15 C.F.R. §§ 30.90-91 (1974) (import-export data held by the Census Bureau).

Several statutes regulate agency transfer of records. *See, e.g.*, 44 U.S.C. § 2906 (1970) (permitting the Administrator of General Services to inspect the records of any federal agency); 44 U.S.C. § 3507 (1970) (requiring agencies to cooperate with other agencies in making information available to each other); 44 U.S.C. § 3508 (1970) (limiting the types of information that may be disclosed by federal agencies).

1920. *See, e.g.*, Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2520 (1970) (authorizing the recovery of civil damages, including punitive awards, if the interception of a wire or oral communication by a government official was unauthorized); Fair Credit Reporting Act §§ 616, 617, 15 U.S.C. §§ 1681n, 1681o (1970).

Many of these statutes contain sanctions against the violating party. *See, e.g.*, Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2511 (1970) (criminal penalties for the violation of the disclosure provisions on the interception of wire and oral communications); 18 U.S.C. § 2518 (1970) (violations of the procedures specified for the interception of wire or oral communications can be punished by contempt and the suppression of evidence so obtained); 13 U.S.C. § 214 (1970) (penalties for wrongful disclosure of census data); INT. REV. CODE OF 1954, § 7213 (penalty for unlawful disclosure of tax returns); 44 U.S.C. § 3508 (1970) (penalties for the unlawful disclosure of information by federal agencies).

has employed are the provisions governing the census,¹⁹²¹ the Omnibus Crime Control and Safe Streets Act of 1968,¹⁹²² the Family Educational Rights and Privacy Act of 1974,¹⁹²³ and the Fair Credit Reporting Act.¹⁹²⁴ An analysis of these statutes reveals that the piecemeal approach to privacy protection has proved to be largely inadequate: None of these statutes provides protection for privacy interests at all stages of the information-handling cycle.

Congress has authorized the Census Bureau to collect information about agriculture,¹⁹²⁵ crime and delinquent classes,¹⁹²⁶ religious bodies,¹⁹²⁷ population, unemployment, and housing,¹⁹²⁸ and foreign commerce and trade.¹⁹²⁹ The authorizing legislation does not prevent the Bureau from obtaining information from any person or source it chooses. Indeed, it specifically permits the Secretary of Commerce to request other governmental offices or departments to provide data¹⁹³⁰ and to contract with educational and other research organizations for the preparation of monographs and other reports and materials of a similar nature.¹⁹³¹ Collection of information by the Bureau is facilitated by sections providing for the imposition of criminal penalties upon persons refusing to answer questions or answering falsely and upon persons who fail to assist census employees in certain specified situations.¹⁹³² Significantly, the authorizing legislation has no provisions specifying the methods to be used in collecting the information.¹⁹³³

The statute allows the Bureau to use collected information only for statistical purposes¹⁹³⁴ and prohibits the publication of data that can be identified with a particular establishment or individual and the examination of individual reports by any nonemployee of the Bureau.¹⁹³⁵ The statute does provide, however, that the Secretary may disclose population, agriculture, and housing information for

1921. 13 U.S.C. §§ 1-307 (1970).

1922. Pub. L. No. 90-351, 82 Stat. 197 (codified in scattered sections of 5, 15, 18, 28, 42, 47 U.S.C.).

1923. 20 U.S.C.A. § 1232g (Supp. Feb. 1975).

1924. 15 U.S.C. §§ 1681-81t (1970).

1925. *See, e.g.*, 13 U.S.C. § 41 (1970) (cotton statistics); 13 U.S.C. § 61 (1970) (statistics on oilseeds, nuts, kernels, fats, oils, and greases).

1926. *See, e.g.*, 13 U.S.C. § 101 (1970).

1927. *See, e.g.*, 13 U.S.C. § 102 (1970).

1928. *See* 13 U.S.C. § 141 (1970) (permitting a decennial census).

1929. *See* 13 U.S.C. § 301 (1970).

1930. 13 U.S.C. § 6 (1970).

1931. 13 U.S.C. § 13 (1970).

1932. *See* 13 U.S.C. §§ 221-25 (1970).

1933. *But see* 44 U.S.C. §§ 3501, 3503-05 (1970) (applying to all federal agencies).

1934. 13 U.S.C. § 9 (1970).

1935. 13 U.S.C. § 9 (1970). This section does not, however, apply to information obtained from public records.

"genealogical and other proper purposes" to anyone requesting such information,¹⁹³⁶ with the sole stipulation being that such information may not be used "to the detriment of" people to whom the information relates.¹⁹³⁷ The sole remedy provided for wrongful disclosure of information is the imposition of criminal penalties upon the disclosing employee:¹⁹³⁸ no provision is made for compensating the party injured by the disclosure.

The Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Crime Control Act of 1973,¹⁹³⁹ includes numerous provisions regulating what information may be collected and what methods may be used in criminal investigations.¹⁹⁴⁰ The Act prohibits the use of illegally intercepted wire or oral communications,¹⁹⁴¹ and requires that law enforcement research and statistical information identifiable to a particular person not be used for any purpose other than that for which it was obtained, that such information be immune from legal process, and that such information not be used as evidence or for any other purpose in any proceeding without the consent of the person furnishing the information.¹⁹⁴² It further requires procedures to keep stored information current and to assure that the security and privacy of the information is protected, and entitles an individual who believes that criminal-history information concerning him contained in an automated system is inaccurate, incomplete, or maintained in violation of the Act, to review and obtain a copy of such information for purposes of challenge or correction.¹⁹⁴³ The Act imposes criminal fines on those violating the section on law enforcement research and statistical information,¹⁹⁴⁴ and fines or imprisonment on those willfully violating the provisions on wire and oral communications.¹⁹⁴⁵ The Act also allows for the recovery of civil damages by a person whose wire or oral communi-

1936. 13 U.S.C. § 8(a) (1970).

1937. 13 U.S.C. § 8(c) (1970). A number of state court decisions define "detriment," although no clear consensus emerges from these cases. *See, e.g.*, *Supervisors of County of Boone v. Village of Rainbow Gardens*, 14 Ill. 2d 504, 153 N.E.2d 16 (1958); *State ex rel. Pritchard v. Board of Health*, 198 S.2d 490 (La. Ct. App. 1967); *State ex rel. Lytell v. Board of Health*, 153 S.2d 498 (La. Ct. App. 1963); *Stahl v. Board of Fin.*, 62 N.J. Super. 562, 163 A.2d 396 (1960); *Wilkins v. City of New York*, 25 Misc. 2d 27, 207 N.Y.S.2d 11 (Sup. Ct. 1960); *Edwards v. Edwards*, 239 S.C. 85, 121 S.E.2d 432 (1961).

1938. 13 U.S.C. § 214 (1970).

1939. Pub. L. No. 93-83, 87 Stat. 197 (codified in scattered sections of 5, 40, 42 U.S.C.).

1940. *See, e.g.*, 18 U.S.C. §§ 2510-20 (Supp. I 1971).

1941. 18 U.S.C. § 2511 (1970).

1942. 42 U.S.C. § 3771(a) (Supp. III 1973).

1943. 42 U.S.C. § 3771(b) (Supp. III 1973).

1944. 42 U.S.C. § 3771(c) (Supp. III 1973).

1945. 18 U.S.C. § 2511(l) (1970).

cations are unlawfully intercepted, including punitive damages and attorney's fees.¹⁹⁴⁶

The final two statutes limit information gathering by federally regulated private and state institutions rather than by the federal government. They are nevertheless germane to the subject of limitations on the federal government's power to collect and keep personal data because they indicate congressional concern for individual privacy and include some particularly strong safeguards.

The Family Educational Rights and Privacy Act of 1974 (Education Act), applicable to all schools receiving federal funds, deals with the retention and dissemination of school-related information. It provides that students over the age of eighteen or attending "an institution of postsecondary education" and parents of all other students¹⁹⁴⁷ are to have the "right to inspect and review any and all official records, files and data directly related" to the students that are "intended for school use or to be available to parties outside the school or school system."¹⁹⁴⁸ The Act further provides that there shall be an "opportunity for a hearing to challenge the content of [the] . . . school records, to insure that the records are not inaccurate, misleading or otherwise in violation of the privacy or other rights of students"¹⁹⁴⁹ The Act prohibits the release of "personally identifiable records" without the consent of a student over eighteen or at a post-secondary educational institution, or of the parents of students under 18 except under limited circumstances.¹⁹⁵⁰ Where release of information is permitted to a third party, that party may not further disseminate the information without the consent of the parents or the student.¹⁹⁵¹ The Act also requires that the parents or students be informed of the rights accorded them under it.¹⁹⁵² Violation of the provisions of the Act results in the termination of federal funding to the violating institution.¹⁹⁵³

The purpose of the Fair Credit Reporting Act (Credit Act),¹⁹⁵⁴ which applies to purely private organizations, is to ensure "that the

1946. 18 U.S.C. § 2520 (1970). The section provides a complete defense, however, for the good faith reliance on a court order and for actions taken in certain emergency situations.

1947. 20 U.S.C.A. § 1232g(d) (Supp. Feb. 1975).

1948. 20 U.S.C.A. § 1232g(a)(1) (Supp. Feb. 1975).

1949. 20 U.S.C.A. § 1232g(a)(2) (Supp. Feb. 1975).

1950. 20 U.S.C.A. § 1232g(b) (Supp. Feb. 1975).

1951. 20 U.S.C.A. § 1232g(b)(4)(B) (Supp. Feb. 1975).

1952. 20 U.S.C.A. § 1232g(e) (Supp. Feb. 1975).

1953. 20 U.S.C.A. §§ 1232g(a), (b), (c) (Supp. Feb. 1975).

1954. See generally Note, *The Fair Credit Reporting Act*, 56 MINN. L. REV. 819 (1972); Comment, *The Fair Credit Reporting Act: Are Business Credit Reports Regulated?*, 1971 DUKE L.J. 1229; Comment, *The Impact of the Fair Credit Reporting Act*, 50 N.C. L. REV. 852 (1972).

consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information"¹⁹⁵⁵ The Credit Act does not contain any provisions limiting the scope of information that may be collected. It does, however, provide that the consumer must be informed that a report is being prepared about him, and requires advance notice and other special measures of protection where a report will involve interviews with friends and others concerning the subject's personal life.¹⁹⁵⁶ The bulk of the Credit Act relates to the retention and dissemination of information. It requires agencies to follow reasonable procedures to assure the maximum possible accuracy of the information they report,¹⁹⁵⁷ and like the Education Act, grants the consumer the right to learn what is in his file.¹⁹⁵⁸ The Credit Act also requires that obsolete information be removed from consumer reports¹⁹⁵⁹ and that challenged information be reported with a statement of the consumer's side of the dispute.¹⁹⁶⁰ Section 604 requires the consumer's permission before a credit reporting bureau may furnish any person with a credit report concerning him, except for a few specified purposes.¹⁹⁶¹ Notwithstanding this provision, however, certain information may be provided to governmental agencies.¹⁹⁶² An aggrieved person can recover actual damages and attorney fees for negligent noncompliance with the Act¹⁹⁶³ and punitive damages as well for willful noncompliance.¹⁹⁶⁴ The Act also imposes criminal penalties on officers or employees of a consumer reporting agency who knowingly and willfully disclose information concerning an individual to a person not authorized to receive that information.¹⁹⁶⁵

All four of these acts provide at least some degree of protection for individual privacy interests. However, none is comprehensive. Of the four, none constitutes a real limitation on information acquisition: the Census provisions and Education Act place no restrictions on acquisition, the Crime Act prohibits only certain interceptions of oral and wire communications, and the Credit Act limits only

1955. Fair Credit Reporting Act § 602, 15 U.S.C. § 1681b (1970).

1956. Fair Credit Reporting Act § 606, 15 U.S.C. § 1681d (1970).

1957. Fair Credit Reporting Act § 607(b), 15 U.S.C. § 1681e(b) (1970).

1958. Fair Credit Reporting Act § 609, 15 U.S.C. § 1681g (1970).

1959. Fair Credit Reporting Act § 605, 15 U.S.C. § 1681c (1970).

1960. Fair Credit Reporting Act § 611, 15 U.S.C. § 1681i (1970).

1961. 15 U.S.C. § 1681b (1970).

1962. Fair Credit Reporting Act § 608, 15 U.S.C. § 1681f (1970).

1963. Fair Credit Reporting Act § 617, 15 U.S.C. § 1681o (1970).

1964. Fair Credit Reporting Act § 616, 15 U.S.C. § 1681n (1970).

1965. Fair Credit Reporting Act § 620, 15 U.S.C. § 1681r (1970).

interviews with friends and others concerning the personal life of the subject of a credit report. At the retention stage, all of the acts except the Census provisions have significant restraints on government information-handling, including provisions for subject access and challenge. In particular, the Crime and Credit Acts place affirmative duties on agencies to ensure that records are kept current. In the area of dissemination, all four of the acts apply: the Education and Credit Acts severely limit disclosure without the consent of the subject, the Crime Act allows most information to be used only for the purpose for which it was obtained, and the Census provisions, while allowing dissemination for proper purposes, proscribe the use of such information to the detriment of the subject. Finally, by way of remedies for the injured party, the acts are largely silent. The Credit Act apparently allows full recovery for negligent noncompliance with its provisions, but the Census and Education provisions have neglected the issue and the Crime Act allows recovery only for unlawful interceptions of wire and oral communications. Taken together, these acts demonstrate that a comprehensive privacy act was needed both to assure protection at all stages of the government's information-handling process, and to make the various privacy protections applicable to a much wider range of information-handling settings.

E. *The Privacy Act of 1974*

The Privacy Act of 1974 (Privacy Act)¹⁹⁶⁶ attempts to protect individual privacy interests by restricting the information practices of federal agencies.¹⁹⁶⁷ Although the Privacy Act deals with all stages

1966. 5 U.S.C.A. § 552a (Supp. Feb. 1975). The Senate bill, S. 3418, 93d Cong., 2d Sess. (1974), differed in several ways from the House bill, H.R. 16373, 93d Cong., 2d Sess. (1974). No conference report was prepared. For a comparison of the Senate and House versions and the compromises reached see *Analysis of House and Senate Compromise Amendments to the Federal Privacy Act*, in 120 CONG. REC. H12,243-46 (daily ed. Dec. 18, 1974).

The provisions of the Privacy Act that directly limit the acquisition, retention and dissemination of information and that grant the rights of subject notice, access, and challenge do not go into effect until 270 days following the day of enactment. Privacy Act § 8, 5 U.S.C.A. § 552a (note) (Supp. Feb. 1975).

1967. The Privacy Act relies on the definition of agency provided in section 552(e) of the FOIA. Privacy Act § 3, 5 U.S.C.A. § 552(a)(1) (Supp. Feb. 1975). For a discussion of that definition see text at notes 334-64 *supra*.

S. 3418, 93d Cong., 2d Sess. (1974), as originally proposed, would have regulated all information systems. Proponents of this approach pointed to the proliferation of private information systems, examples of invasions of privacy by nongovernmental organizations, and the need for a comprehensive approach to the problem. *Joint Hearings*, *supra* note 1641, at 161 (testimony of H. Eastman, representing the ACLU). See also *id.* at 242 (statement of D. McGraw, Assistant Commissioner of Administration, Minnesota). However, other witnesses argued that the first privacy legislation should be limited to regulating the information systems of the federal government. For example the National Retail Merchants Association thought the "risks to personal privacy created by governmental, as compared to private personal data systems" were sufficient

of the information-handling process, it primarily addresses the problems of subject access and dissemination. The Privacy Act requires publication of the existence and characteristics of all personal information systems kept by every federal agency,¹⁹⁶⁸ permits individuals¹⁹⁶⁹ to have access to records containing personal information about them,¹⁹⁷⁰ and requires the subject's consent to nonroutine transfers of such information.¹⁹⁷¹ The Privacy Act also imposes criminal penalties¹⁹⁷² and provides for civil remedies.¹⁹⁷³ As a whole, the Act adopts a broad formulation of the right of privacy, which protects the individual's interest in controlling the dissemination of the details of his identity.

In the hearings on the Privacy Act, many agencies argued that the adoption of a broad privacy concept would prevent proper agency administration¹⁹⁷⁴ and prove unduly expensive.¹⁹⁷⁵ Privacy advocates questioned these assertions in some instances,¹⁹⁷⁶ but urged

to warrant different legislation. *Id.* at 629. Professor Westin warned that a national registry of all data banks, including political, racial, religious, and ideological groups, might threaten first amendment rights. *Id.* at 71.

It seems wise that Congress limited the Privacy Act's coverage to federal agencies. The coalition of business, agencies, and state governments opposing extension of the Act could have defeated any broad privacy bill, crippled it, or delayed its passage for a long time. An act regulating federal information systems allows private organizations to regulate themselves voluntarily. It also provides a precedent for later privacy legislation, if needed.

1968. Privacy Act § 3, 5 U.S.C.A. § 552a(e)(4) (Supp. Feb. 1975), set out in note 2052 *infra*.

1969. The Act defines "individual" as a "citizen of the United States or an alien lawfully admitted for permanent residence." Privacy Act § 3, 5 U.S.C.A. § 552a(a)(2) (Supp. Feb. 1975). It was argued in the hearings that privacy is an individual right and that corporate and individual interests should be protected in separate legislation. *See Access to Records, Hearings on H.R. 12206 Before a Subcomm. of the House Comm. on Government Operations*, 93d Cong., 2d Sess. 180 (statement of T. McFee, Deputy Assistant Secretary for Management Planning of Technology, HEW), 207 (statement of Representative Abzug) (1974) [hereinafter *Hearings on Access*]. *But see id.* at 207 (statement of Representative Koch).

1970. *See* text at notes 2055-69 *infra*.

1971. *See* text at notes 2107-23 *infra*.

1972. *See* text at notes 2154-56 *infra*.

1973. *See* text at notes 2129-53 *infra*.

1974. For example, the spokesperson for the VA testified, "It is considered appropriate to observe that the provisions of the bill could materially interfere with the agency's performance of its mission in ways other than increased administrative work load." *Hearings on Records*, *supra* note 1517, at 131. *See also id.* at 89 (statement of H. Peterson, Assistant Attorney General, Criminal Division, Department of Justice), 109 (statement of D. Cooke, Deputy Assistant Secretary of Defense).

1975. *See id.* at 62 (Civil Service Commission), 89 (Justice Department), 109 (Defense Department), 132 (VA).

1976. The General Services Administration permits individual access to records and the Deputy Assistant Secretary testified that the provision was not an undue burden on administration. *Id.* at 129. Moreover, experience with the access requirements of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-81t (1970), has shown that credit agencies have not been overburdened by requests for access. *Hearings on Access*, *supra* note

that in any case the nation should accept any unavoidable costs of ensuring privacy.¹⁹⁷⁷ The final bill thus represented a compromise between these interests.¹⁹⁷⁸ In several respects, however, the compromises made to secure passage of the Act unwisely diluted privacy protection. First, the Act fails to establish an adequate standard for restricting data acquisition.¹⁹⁷⁹ Second, it almost completely ignores the need to regulate methods of data-gathering.¹⁹⁸⁰ Third, although the Act provides significant protection during the retention stage,¹⁹⁸¹ in several respects it severely restricts the right of subject access.¹⁹⁸² Fourth, agencies can too easily evade the general requirement that an agency disseminate information about an individual only with his consent.¹⁹⁸³ Fifth, the provision establishing a civil cause of action for those injured by violations of the Act is ambiguous and could be interpreted to limit severely the instances in which this remedy is available.¹⁹⁸⁴ Sixth, the exemptions to the Privacy Act could be drawn more narrowly without interfering with important government functions.¹⁹⁸⁵ Finally, the provisions integrating the Privacy Act with the FOIA are ambiguous and could result in startling amendments to the FOIA.¹⁹⁸⁶ This section examines the deficiencies and interpretative difficulties in the provisions of the Privacy Act relating to each of these problem areas.

1. Acquisition

The Privacy Act authorizes each agency to collect¹⁹⁸⁷ "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President."¹⁹⁸⁸ The "relevant and necessary" standard,¹⁹⁸⁹ however, does little to limit government collection

1969, at 264-65 (testimony of S. Feldman, Assistant Director for Special Statutes, Bureau of Consumer Protection).

1977. See 120 CONG. REC. H2462 (daily ed. April 2, 1974). The Office of Management and Budget was unable to provide an accurate cost estimate of the administration of the Privacy Act. S. REP. NO. 93-1183, 93d Cong., 2d Sess. 85 (1974).

1978. See 11 WEEKLY COMP. OF PRES. DOCS. 7 (Jan. 1, 1975).

1979. See text at notes 1987-2019 *infra*.

1980. See text at notes 2020-51 *infra*.

1981. See text at notes 2052-54 *infra*.

1982. See text at notes 2055-88 *infra*.

1983. See text at notes 2107-23 *infra*.

1984. See text at notes 2129-38 *infra*.

1985. See text at notes 2163-95 *infra*.

1986. See text at notes 2196-211 *infra*.

1987. The actual word used by the Privacy Act is "maintain," defined as including "maintain, collect, use, or disseminate." Privacy Act § 3, 5 U.S.C.A. § 552a(a)(3) (Supp. Feb. 1975).

1988. Privacy Act § 3, 5 U.S.C.A. § 552a(e)(1) (Supp. Feb. 1975).

1989. Some members of Congress had opposed any limits on acquisition because

of data, as evidenced by questionnaires propounded in recent years by agencies that have long operated under similar standards. For example, Bureau of the Census guidelines for census questions include both relevance and need requirements.¹⁹⁹⁰ Nevertheless, the list of questions proposed for the decennial census of 1970, which engendered considerable controversy, included questions on religious affiliation, social security numbers, physical and mental handicaps, registration and voting records,¹⁹⁹¹ smoking, moonlighting, union membership, and household pets.¹⁹⁹² It also included questions on rent paid, value of houses owned, earnings, airconditioning, plumbing facilities, number of divorces, and the number of babies women had had.¹⁹⁹³ A much-criticized federal questionnaire, the Longitudinal Retirement History Survey¹⁹⁹⁴ issued under the aegis of the Census Bureau at the request of the Department of Health, Educa-

they doubted that a standard could be found that would give individuals some protection without also preventing agencies from carrying out their functions. *Cf. Hearings on Access, supra* note 1969, at 97 (statement of Representative Koch). They also thought that such a restriction was not necessary because a right of subject access could be used to discover and expose to Congress any agency excesses. *Id.* These arguments, however, fail to recognize that mere collection of data may produce psychological harm, *see* text at notes 1536-40 *supra*, or a "chilling effect" on the exercise of first amendment rights. *See* text at notes 1541-49 *supra*; *Hearings on Access, supra*, at 119-34. Moreover, reliance on congressional oversight is unrealistic. First, an individual may be unwilling to disclose to his elected representatives activities that might be considered un-American or unnatural. Second, it may be difficult to gain the attention of Congress, and, third, even if the individual is heard, Congress may not take any remedial action. *See also* STAFF OF THE SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 1ST SESS., REPORT ON MILITARY SURVEILLANCE OF CIVILIAN POLITICS 7 (Comm. Print 1973) [hereinafter *MILITARY SURVEILLANCE OF CIVILIAN POLITICS*]. Finally, congressional oversight is necessarily an ad hoc approach. A general standard allows resolution of many problems before they arise.

At the hearings on the Privacy Act, witnesses proposed a variety of alternatives to the relevant and necessary standard for limiting government-information acquisition. At one extreme, the director of the ACLU argued that there are some questions that cannot be justified on the basis of government need. *Hearings on the Census, supra* note 1509, at 270-78. At the other extreme, the standard of "relevant to a valid governmental function" was suggested. *Id.* at 106 (testimony of A. Miller, National Law Center, George Washington University). Intermediate suggestions included "a clear[ly] demonstrated need for the data," *id.* at 186 (testimony of A. Miller, Professor, University of Michigan Law School), and "reasonably necessary to a governmental purpose or for significant public information." *Id.* at 225 (letter from C. Fried, Professor, Harvard Law School).

1990. *Hearings on the Census, supra* note 1509, at 238.

1991. SUMMARY AND CONCLUSIONS, *supra* note 1515, at 12.

1992. A. MILLER, *supra* note 1503, at 135.

1993. *Hearings on the Census, supra* note 1509, at 153. After congressional hearings, the Bureau of the Census omitted the questions in the first list but not those in the second. *Id. passim. Cf. Hearings on the 1970 Census Questions Before the Subcomm. on the Census and Statistics of the House Comm. on the Post Office and Civil Service*, 89th Cong., 2d Sess. (1966) [hereinafter *Hearings on the 1970 Census Questions*].

1994. The questionnaire is reprinted in *Hearings on the Census, supra* note 1509, at 883-924.

tion, and Welfare,¹⁹⁹⁵ asked questions such as: "taking things altogether, would you say you are very happy, pretty happy, or not too happy these days,"¹⁹⁹⁶ "do you have any artificial dentures,"¹⁹⁹⁷ "what were you doing most of last week,"¹⁹⁹⁸ "do you or your spouse see or telephone your parents as often as once a week,"¹⁹⁹⁹ "what is the total number of gifts that you give to individuals per year."²⁰⁰⁰ These questions were defended as relevant and necessary for legitimate governmental purposes.²⁰⁰¹ Similarly, agencies have defended a real estate survey asking for details about recent property acquisitions, including character of the property, price paid, method of payment, and amount of mortgage,²⁰⁰² and a Department of Defense questionnaire, distributed to retired members of the military reserve, asking not only how much the veteran earned in the previous year but also how much other members of the family earned.²⁰⁰³

As demonstrated by the foregoing examples of government information demands, the elasticity of the "relevance" concept and the large number of conceivable governmental "needs" make them unsatisfactory standards for limiting acquisition. A more flexible balancing approach would seem more desirable because of its ability to reconcile the conflicting interests on a case-by-case basis. Such a balancing test should forbid the collection of information about any individual unless the collector-agency can show a clearly demonstrable need that outweighs the individual privacy interests and should require consideration of at least the following factors: First, consideration should be given to the sensitivity of the information sought. Information entitled to constitutional²⁰⁰⁴ or common-law²⁰⁰⁵ protec-

1995. *Id.* at 883.

1996. *Id.* at 897 (question 55).

1997. *Id.* at 901 (question 64b).

1998. *Id.* at 884 (question 1).

1999. *Id.* at 904 (question 75a).

2000. *Id.* at 907 (question 99a).

2001. *See id.* at 233-68 (testimony of W. Chartener, Assistant Secretary of Commerce for Economic Affairs).

2002. *Reprinted in id.* at 12-13.

2003. *Reprinted in id.* at 37-53.

Congressional hearings on federal questionnaires suggested that some questions had been included upon request by private organizations, *id.* at 188 (testimony of A. Miller, Professor, University of Michigan Law School), some were unnecessary because the information was already available, *id.* at 33, and some were included for no apparent reason. *Id.* at 57 (statement of Senator Ervin). Federal employees have probably been subjected to the most offensive information demands. They have been asked to disclose such personal matters as race, religion and national origin, political, social, and sexual activities, family assets, and personal feelings about religion, family, and sex. S. REP. NO. 90-534, 90th Cong., 1st Sess. 7 (1967).

2004. *See* text at notes 1789-915 *supra*.

2005. *See* text at notes 1562-625 *supra*.

tion would be the most sensitive, followed by information generally regarded as private and hence not commonly divulged. Under this test, for example, an agency would have to demonstrate a greater need in order to justify acquisition of information concerning an individual's political affiliation, which is constitutionally protected,²⁰⁰⁶ than it would to justify collection of an individual's name, age, and sex. Second, consideration should be given to the importance of the purpose for which the information is sought and the logical nexus between the information and that purpose. The IRS, for example, has a greater need for financial information than does the Bureau of Census; the Department of Defense has a greater need to inquire into the general personal background of a person being considered for certain sensitive positions than the Postal Service does to make broad-ranging inquiries prior to promotion of its employees. Similarly, the agency need for information from government benefit recipients and government employees is greater than the need for information from those merely being surveyed. Third, consideration should be given to the form in which the information is to be stored. If the information will not be kept in individually identifiable files there is little potential for harm and a lesser demonstration of need should suffice.²⁰⁰⁷ Finally, consideration should be given to the intended length of retention and breadth of dissemination. As each increases, so does the danger of misuse.

The Privacy Act does subject government acquisition of information to strict requirements in one significant area. It provides in subsection (e)(7) that no agency shall collect information "describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom [a] record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity."²⁰⁰⁸ The provision, presumably a reaction to military and CIA surveillance of civilians,²⁰⁰⁹ was designed to protect the preferred status of the

2006. See text at notes 1860-63 *supra*.

2007. Even where information is not stored in individually identifiable files there is reason to require a showing of need before data collection because of the potential psychological harm and chilling effect on the exercise of rights. See text at notes 1536-49 *supra*.

2008. Privacy Act § 3, 5 U.S.C.A. § 552a(e)(7) (Supp. Feb. 1975).

2009. Congressional hearings conducted in 1974 revealed that military surveillance of civilian activities had originated in World War I and had been going on, in varying degrees of intensity, ever since. In the wake of the riots in urban areas and on college campuses in the 1960's, the Army expanded its intelligence system so that by 1970 it was monitoring virtually all political protest in America. It was estimated that the Army had files on over 100,000 civilians unaffiliated with the Armed Forces. STAFF OF THE SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 92D CONG., 2D SESS., ARMY SURVEILLANCE OF CIVILIANS: A DOCUMENTARY ANALYSIS 76 (Comm. Print 1974) [hereinafter ARMY SURVEILLANCE OF CIVILIANS]. The collection plans promulgated were broad and vague, resulting in the gathering of much irrele-

first amendment.²⁰¹⁰ It goes further than the Constitution, however, by not requiring the demonstration of a “chilling effect.”²⁰¹¹ Yet in two respects the provision is deficient. First, the provision should give similar protection to the other, equally critical facets of the right of disclosural privacy, such as information relating to sexual attitudes and conduct and to personal activities with those related by blood or marriage.²⁰¹² Second, the exception to the provision allowing collection of information with individual consent fails to recognize the fact that in many contexts information requests are coercive. The Senate report on the rights of federal employees found that in the federal service and similar organizational situations an employer information request is equivalent to a command.²⁰¹³ Government benefit recipients are similarly situated. To ensure full protection for the underlying constitutional rights in these situations, the provision instead should have required a knowing and intelligent consent.²⁰¹⁴

Subsection (e)(3) of the Privacy Act requires each agency collecting information to “inform each individual whom it asks to supply information [of] . . . (A) the authority . . . which authorizes the solicitation of the information and whether disclosure is mandatory or voluntary; (B) the principal purpose or purposes for which the information is intended to be used; (C) [the uses that can be made of the information without his consent]; and (D) the effects on him, if any, of not providing all or any part of the requested information.” The apparent purpose of this requirement is to provide the individual with sufficient information to make an intelligent decision whether to surrender information or to challenge the information

vant, incorrect, ambiguous, and useless information. *MILITARY SURVEILLANCE OF CIVILIAN POLITICS*, *supra* note 1989, at 6. Information was collected about financial affairs, sex lives, and psychiatric histories, often by covert means. *ARMY SURVEILLANCE OF CIVILIANS*, *supra*, at 96.

The investigating Senate subcommittee rejected arguments that the monitoring was reasonably related to the duty of the Army to protect against a possible re-occurrence of civil disorders, and found that “there is no question that military surveillance of civilian political activity is illegal, at least in the sense that it was not authorized by law. . . . [T]he subcommittee cannot imply the need for such domestic operations from the military’s limited domestic mission.” *MILITARY SURVEILLANCE OF CIVILIAN POLITICS*, *supra*, at 7. The report also concluded that the military’s activities were in violation of the first amendment. *Id.* at 9.

2010. S. REP. NO. 93-1183, *supra* note 1977, at 56.

2011. See text at note 1866 *supra*.

2012. See text at notes 1898-900 *supra*.

2013. S. REP. NO. 90-534, *supra* note 2003, at 5.

2014. If the right to privacy were acknowledged as a constitutional one, it is arguable that a knowing and intelligent waiver would be mandated by the Constitution. Cf. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Because the Supreme Court has modified this standard with respect to some rights, see, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 235 (1973), it is preferable that the statute incorporate the stricter standard.

request. Such knowledge is likely to increase participation in data-gathering, enhance the reliability of information provided, reduce public resentment and suspicion of government practices, and encourage the public to comment on agency policy.²⁰¹⁵ However, three additions to subsection (e)(3) would aid in more fully achieving these goals and would make the provision more consistent with the Act's broad concept of the privacy right.

Principally, when the person from whom the information is sought will be the subject of the file, the collecting agency should explain to that individual his right to challenge collection and the procedure for challenge, and his rights of access to the file for the purpose of ensuring its accuracy.²⁰¹⁶ Additionally, before an agency collects information about a data subject from third persons, the agency should be required to reveal to the subject the names of such third persons and the type of information to be sought from them, except in situations where the agency is justified in keeping the existence of the investigation secret from the data subject. When information is collected from third persons, the subject's right of access to the file is an inadequate privacy protection²⁰¹⁷ because without notice the subject will in most instances have little reason to suspect that the file exists. To be sure, information known to others is not protected by the common-law concept of privacy.²⁰¹⁸ But the statute's protection should extend to this aspect of data acquisition because people are more inclined to respond to government requests for information than individual requests,²⁰¹⁹ and because the government, by virtue of its size and resources, has a greater capacity to disseminate information about an individual than has any private person.

A further problem with subsection (e)(3) is that its notice provisions apply only when an agency collects information by asking the individual directly. Because the Privacy Act imposes almost no limitations on the methods an agency can use to gather information, an agency could in some circumvent notice requirements by gathering data from third parties or by utilizing covert procedures. One solution to this problem would be to require notice to the data subject unless notice would frustrate legitimate programs of covert surveillance. A better solution, discussed below, is to limit agency use of nondirect methods of data collection.

2015. See *Joint Hearings*, *supra* note 1641, at 2304-07 (report prepared by A. Bell for the Committee on Rulemaking and Public Information of the Administrative Conference of the United States).

2016. The rights of subject access and challenge are discussed in the text at notes 2055-98 *infra*.

2017. See text at notes 2049-51 *infra*.

2018. See text at notes 1586-87 *supra*.

2019. See *Hearings on the Census*, *supra* note 1509, at 194 (testimony of A. Miller, Professor, University of Michigan Law School), 215 (testimony of C. Fried, Professor, Harvard Law School).

2. *Methods of Data Collection*

The Privacy Act's sole restriction on methods of data acquisition is the requirement in subsection (e)(2) that agencies "collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs." The provision reflects the basic principle of fairness, advocated by the Senate's report on the Privacy Act, "that where government investigates a person, it should not depend on hearsay or 'hide under the eaves,' but inquire directly of the individual about matters personal to him or her."²⁰²⁰ It also "supports the principle that an individual should to the greatest extent possible be in control of information about him which is given to the government."²⁰²¹ The provision thus disfavors acquisition from third parties or by covert means, although it recognizes implicitly that such methods may be necessary "for financial or logistical reasons or because of other statutory requirements."²⁰²² While the legislative history makes clear that minor financial or logistical concerns are not to outweigh privacy interests,²⁰²³ it does not answer the critical questions of when it will not be "practicable" to collect from the subject and when subsection (e)(2) will be overridden by other statutes.

As originally introduced, the subsection (e)(2) "greatest extent practicable" requirement applied to all government information acquisitions. In order to meet agency objections based on the needs of certain civil and criminal law enforcement programs, the provision was limited to instances where the information sought could affect the receipt of direct benefits under a federal program.²⁰²⁴ The limitation was a rather crude method, however, of satisfying the agency objections. For example, although criminal investigations are completely exempted from subsection (e)(2) by the general exemptions of subsection (j)(2),²⁰²⁵ not all civil investigations are exempted. Thus, in a social security fraud investigation, which could lead to a denial of benefits, the agency presumably would be required to comply with subsection (e)(2). More significantly, the limitation as enacted exempts numerous informational studies that are not aimed at civil law enforcement and are not related to the granting or denying of benefits under federal programs.²⁰²⁶ Rather

2020. S. REP. NO. 93-1183, *supra* note 1977, at 47.

2021. 120 CONG. REC. H12,245 (daily ed. Dec. 18, 1974).

2022. *Id.*

2023. *See* S. REP. NO. 93-1183, *supra* note 1977, at 48.

2024. *Id.* at 47.

2025. *See* text at note 2174 *infra*, arguing that such an exemption is unnecessary.

2026. Therefore, under the Privacy Act the sensitive information gathered in the Longitudinal Retirement History Survey, *see* text at notes 1994-2000 *supra*, could be

than carve out in rough fashion an exception to the requirements of subsection (e)(2), Congress should have established a general standard applicable to all information acquisition that would take into account the nature of the agency's activities and the importance of the state's need for the information, as well as considerations of practicability. A provision prohibiting the use of any method of information collection that is unreasonable would allow these factors to be taken into account. Such a standard would require a balancing of the nature of the agency's function and considerations of practicability against privacy interests.

A reasonableness standard for acquisition methods could also remedy another deficiency of the Privacy Act—its failure to give an agency any guidance as to what methods of collection it may use once it has determined that it must collect information directly from the data subject. Hearings on the use of mandatory questionnaires,²⁰²⁷ lie detector²⁰²⁸ and psychological²⁰²⁹ tests, and military surveillance of civilians²⁰³⁰ have reflected congressional concern for this problem but have failed to produce any legislative solutions. A standard of reasonableness would clearly preclude the use of any presently illegal or unauthorized acquisition methods. The reasonableness of otherwise legal and authorized methods should depend at least on the government interest served by collection of the information, the reliability of the method, the dangers posed by the method, the degree of control the method allows the subject to retain over the amount of information revealed, and the practicability of alternative methods available. Inclusion of the first factor allows the government to use otherwise unreasonable methods if it can demonstrate a sufficiently great need. The second factor requires consideration of the extent to which the proposed method will collect accurate information. The third factor accounts for the fact that some methods of acquisition, such as covert surveillance, are potentially more dangerous than others because of a greater likelihood of misuse or because of their

sought from persons other than the individual. The same possibility exists with regard to all other "informational" surveys.

2027. *Hearings on the Census*, *supra* note 1509.

2028. *Hearings on Privacy and the Rights of Federal Employees Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966) [hereinafter *Hearings on Federal Employees*]; *Hearings on the Use of Polygraphs by the Federal Government Before a Subcomm. of the House Comm. on Government Operations*, 88th Cong., 2d Sess., 89th Cong., 1st Sess. (1964-1965) [hereinafter *Hearings on Polygraphs*].

2029. *Hearings on Psychological Testing Procedures and the Rights of Federal Employees Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965) [hereinafter *Hearings on Psychological Testing*].

2030. *Military Surveillance Hearings on S. 2318 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974) [hereinafter *Hearings on Military Surveillance*].

potential psychological impact. The fourth factor requires consideration of the basic privacy issue—the extent to which the data subject retains control over the information flow. The final factor ensures that the least offensive method will be used unless rendered infeasible by financial or logistical circumstances.

Consideration of these factors would probably lead to the conclusion, for example, that the use of lie detector and psychological tests to measure suitability for employment or promotion is unreasonable. The lie detector's reliability is suspect because of its dependence on the physiology of the testee²⁰³¹ and because lie detector results are susceptible to conscious manipulation by the testee.²⁰³² Psychological tests have recently come under attack because of racial bias²⁰³³ and because of the absence of objective scientific principles to guide in the construction and evaluation of such tests.²⁰³⁴ Moreover, the persons evaluating test results often lack the expertise needed to make the results reliable.²⁰³⁵ In addition, these testing methods are dangerous because repeated use may lead to conformity among employees,²⁰³⁶ may inhibit the exercise of rights,²⁰³⁷ and may even degrade the individual.²⁰³⁸ Such tests necessarily lead to the unnecessary acquisition of sensitive information²⁰³⁹ and thus infringe on the indi-

2031. H.R. REP. NO. 89-198, 89th Cong., 1st Sess. 12 (1965).

2032. *Id.* at 12-13.

2033. See A. MILLER, *supra* note 1503, at 91-92. See also *Hearings on Special Inquiry on Invasions of Privacy Before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess. 334 (1965) [hereinafter *House Special Inquiry*].

2034. See *Hearings on Psychological Testing*, *supra* note 2029, at 33 ("personality testing is closer to alchemy and other nonsciences than it is to the truth"), 43.

2035. See A. MILLER, *supra* note 1503, at 97-98. Cf. H.R. REP. NO. 89-198, *supra* note 2031, at 2, 14.

2036. Herman, *Privacy, the Prospective Employee and Employment Testing: The Need To Restrict Polygraph Testing*, 47 WASH. L. REV. 73, 112 (1971).

2037. *Hearings on Federal Employees*, *supra* note 2028, at 221 (testimony of L. Speiser).

2038. Herman, *supra* note 2036, at 86.

2039. Though the questions asked in a polygraph examination vary with each examiner, the aim is always to cover a broad range of topics in search of "unusual responses." The questioner then delves into the "problem" area. *Hearings on Polygraphs*, *supra* note 2028, at 38. Consider the sample question in a proposed manual for adapting the polygraph to pre-employment screening:

HAVE YOU EVER SUFFERED A NERVOUS BREAKDOWN?

If so, when; cause and period of adjustment; frequency; hospitalized or not; family problems; mental maladjustment; service connected; mild or severe; unable to face reality; carries world's problems on his shoulders; criminal act or tendencies; claustrophobia; afraid of height; insecurity; failed in all endeavors; heavily in debt; amnesia; and others.

R. FERGUSON, *THE POLYGRAPH IN PRIVATE INDUSTRY* 133-35 (1966).

The questions asked on personality tests are often even more probing, inquiring into matters of physical conditions and bodily functions, religious beliefs, and attitudes toward sex and sexual behavior. For example, consider the following questions on the Minnesota Multiphasic Personality Inventory administered to Peace Corps volunteers (to be answered true or false):

17. My father was a good man.

vidual's control over what information he releases. Psychological tests in particular have been characterized as "tests that are designed to overbear the will of the individual . . . by reaching behind conscious articulation."²⁰⁴⁰ Finally, there are less intrusive alternative methods of evaluating employees and job applicants,²⁰⁴¹ as evidenced by the fact that many governments and organizations do not find a need to resort to such tests.²⁰⁴² It is arguable that government interests in national security and the safety of government employees justify use of these tests in limited circumstances.²⁰⁴³ However, in light of all the objectionable characteristics of these tests, it is doubtful that even these important government interests would make these methods reasonable in the context of employment and promotion.

Under this reasonableness of means test the use of mandatory questionnaires similarly would be unreasonable in many cases. The compulsion of responses under implicit or explicit threats of punishment or loss of employment deprives the respondent of any real choice not to answer, and hence of any control over the information he reveals. Congressional hearings on this method suggest that in most instances voluntary questionnaires present an adequate alternative,²⁰⁴⁴ and various private research groups and states have succeeded in obtaining sufficient responses to voluntary questionnaires.²⁰⁴⁵ In certain situations the importance of the government's need for the

18. I seldom have constipation.

19. My sex life is satisfactory.

27. Evil spirits possess me at times.

75. I get angry sometimes.

78. I like poetry.

290. I believe my sins are unpardonable.

387. I have had no difficulty holding my urine.

Hearings on Federal Employees, *supra* note 2028, at 5-6.

2040. Herman, *supra* note 2036, at 128. A few labor arbitration decisions have denied the admissibility of polygraph results, in part because of the invasion of privacy. *See, e.g.*, *Town and Country Food Co.*, 39 Lab. Arb. 332, 335 (1962); *Lag Drug Co.*, 39 Lab. Arb. 1121, 1123 (1962).

2041. For example, careful interviews, analysis of past job performance, aptitude tests, and simulated exercises. Herman, *supra* note 2036, at 87.

2042. *Cf.* A. MILLER, *supra* note 1503, at 93. Twelve states have made the use of polygraphs in the employment context illegal. Four states specifically apply the prohibition to governmental agencies. Herman, *supra* note 2036, at 97-98. In 1953, the AEC discontinued use of the polygraph because the marginal increase in security did not offset the costs in personnel recruitment and employee morale. H.R. REP. NO. 89-198, *supra* note 2031, at 16.

The Guidelines for Testing and Selecting Minority Job Applicants prepared by the California State Fair Employment Commission practically prohibit the use of personality testing as a pre-employment screening device. *Id.* at 119-20. A representative of the CSC testified that his agency does not use personality tests in any personnel decisions because, "these tests are subject to distortion, either purposefully or otherwise. Therefore, the scores are undependable as a basis for employment decisions." *House Special Inquiry*, *supra* note 2033, at 37.

2043. *See* A. MILLER, *supra* note 1503, at 98.

2044. *See Hearings on the Census*, *supra* note 1509, at 219.

2045. *See id.* at 132-47 (testimony of Representative Betts).

information probably does justify use of mandatory questionnaires. For example, enumeration of the population is arguably of special importance because it is specifically required by the Constitution²⁰⁴⁶ and because it must be accurate in order to serve as the basis for apportionment for representation.²⁰⁴⁷ Therefore, responses to questions on the decennial census regarding enumeration could probably be made mandatory. An agency may also be justified in compelling government employees and those seeking employment, and persons seeking or currently obtaining government benefits, to answer relevant questions.²⁰⁴⁸ However, the agency would not be justified in compelling answers to questions that do not bear on the granting of the job or benefit.

A general standard of reasonableness would not only cover all the methods problems ignored by the Privacy Act but would subsume the current subsection (e)(2) test. The probable result of employing such a standard would be to increase the number of instances in which direct collection from the individual is required. Direct collection accords the subject more control over the disclosure of information about himself than alternative methods of collection from third parties or by covert means. Recent experience casts doubt on the reliability of covert surveillance,²⁰⁴⁹ and data collected from third parties is generally less likely to be reliable than data collected directly from the data subject.²⁰⁵⁰ Moreover, covert methods pose the danger that irrelevant information will be collected because such methods are insufficiently selective²⁰⁵¹ and because the subject cannot object to the collection of particular data. Thus, the reasonableness test would require direct collection from the data subject unless the government can show that direct collection is not practicable or that the government need to use other methods is paramount.

3. Retention

An individual needs some control over information retained by the government in order to minimize the danger of invasions of his

2046. U.S. CONST., art. I, § 2. The Constitution does not, however, require that response to the census be mandatory.

2047. However, it is arguable that even this reason does not justify compelling response. The 1960 census was considered sufficiently accurate even though the census was not returned by or never reached 3 per cent of the population as a whole, and 16 per cent of young nonwhites in ghetto areas. *Hearings on the Census, supra* note 1509, at 295.

2048. It might be argued that answers to questions in these situations are not really compelled because the person could forgo the job or benefit rather than answer the questions. This argument overlooks the fact that such a choice may not be available to a welfare or social security recipient or to a person needing or "locked-into" a federal job. See note 1622 *supra*.

2049. See note 2009 *supra*.

2050. Cf. S. REP. NO. 93-1183, *supra* note 1977, at 48.

2051. See note 2009 *supra*.

privacy. By giving the subject of a file the rights of notice, access, and challenge, the Privacy Act enables an individual to find out if an agency has collected information about him, what the information is, and how he can amend it.

The Privacy Act grants the right of notice in two provisions. Subsection (e)(4) requires each agency to publish in the *Federal Register* at least annually a notice of the existence and character of the systems of records it maintains that is sufficiently explicit to enable an individual to guess accurately which agencies maintain records about him.²⁰⁵² Subsection (f)(1) requires agencies to respond to individual inquiries as to whether the information systems named by the individual contain records pertaining to him. An individual can thus locate all federal records pertaining to him by first consulting the *Federal Register* and then writing to all the agencies that maintain the type of records likely to concern him. These provisions of the Privacy Act have been criticized on the ground that it is unrealistic to expect individuals to go to the trouble of writing to the agencies.²⁰⁵³ However, requiring agencies to notify all persons about whom they presently maintain files would be inordinately expensive. Moreover, in the future each agency will have to notify file subjects when it collects information directly from them.²⁰⁵⁴ The approach taken by the Privacy Act on this point thus appears to be a reasonable accommodation of privacy interests and the financial considerations of administration.

The creation of general rights of subject access and challenge is perhaps the most important contribution of the Privacy Act.²⁰⁵⁵ Sub-

2052. Privacy Act § 3, 5 U.S.C.A. § 552a(e)(4) (Supp. Feb. 1975), requires that each agency

maintaining a system of records subject to the provisions of . . . this subsection, publish in the *Federal Register* at least annually a notice of the existence and character of the system of records, which notice shall include—

- (A) the name and location of the system;
- (B) the categories of individuals on whom records are maintained in the system;
- (C) the categories of records maintained in the system;
- (D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;
- (E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;
- (F) the title and business address of the agency official who is responsible for the system of records;
- (G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;
- (H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and
- (I) the categories of sources of records in the system.

2053. See *Hearings on Records*, *supra* note 1517, at 52 (statement of Representative Mikva). See also *Hearings on Access*, *supra* note 1969, at 98 (statement of Representative Abzug).

2054. Privacy Act § 3, 5 U.S.C.A. § 552a(e)(3) (Supp. Feb. 1975). See text following note 2014 *supra*.

2055. A 1974 survey of federal agency information practices revealed that only 53

section (d)(1) establishes a general right of subject access by requiring each agency to permit any individual, upon request, to review his record and obtain a copy of it.²⁰⁵⁶ Such a right of access is the first step toward effective individual control over government information practices and is a necessary prerequisite to a right of challenge and to control over dissemination of the file. Furthermore, it enables individuals to discourage government collection of irrelevant information: When inspection reveals improper information in a file, the subject can publicize the agency's improper acquisition of data in order to put political pressure on the agency.²⁰⁵⁷ Finally, the right of access enables the individual to obtain "the psychological sense of having satisfied oneself about what is really [in his file]."²⁰⁵⁸

Despite the broad language of this provision,²⁰⁵⁹ it does not apply to the CIA,²⁰⁶⁰ the Secret Service,²⁰⁶¹ and to criminal²⁰⁶² law enforcement agencies. Blanket exemptions for these agencies are examined below.²⁰⁶³ The Act also exempts, without regard to the agency, the following six categories of information: classified information,²⁰⁶⁴ statistical information,²⁰⁶⁵ "examination material used solely to de-

per cent of the responding agencies permit an individual to review his or her entire file. See *FEDERAL DATA BANKS*, *supra* note 1515, at XLIII, LIII. The survey did not report on the rights of subject challenge. The FOIA, 5 U.S.C. § 552, *as amended*, 5 U.S.C.A. § 552 (Supp. Feb. 1975), allows access to some records, but gives no right of challenge.

2056. Privacy Act § 3, 5 U.S.C.A. § 552a(d) (Supp. Feb. 1975), provides:

Access to Records.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence.

Privacy Act § 3, 5 U.S.C.A. § 552a(c) (Supp. Feb. 1975), requires each agency both to keep an accounting of disseminations of records to other agencies, and to allow subject access to such accountings. Subsection (c) thus facilitates the right of access and challenge by enabling the subject to find his file no matter where it has been transferred.

2057. *Hearings on Access*, *supra* note 1969, at 97 (testimony of Representative Koch).

2058. S. REP. NO. 93-1183, *supra* note 1977, at 60.

2059. The only restriction in the subsection itself is that "nothing in this section shall allow an individual access to information compiled in reasonable anticipation of a civil action or proceeding." Privacy Act § 3, 5 U.S.C.A. § 552a(d)(5) (Supp. Feb. 1975). This clause is meant to ensure that the Privacy Act does not alter the present rules of discovery. S. REP. NO. 93-1183, *supra* note 1977, at 75.

2060. Privacy Act § 3, 5 U.S.C.A. § 552a(j)(1) (Supp. Feb. 1975).

2061. Privacy Act § 3, 5 U.S.C.A. § 552a(k)(3) (Supp. Feb. 1975).

2062. Privacy Act § 3, 5 U.S.C.A. § 552a(j)(2) (Supp. Feb. 1975).

2063. See text at notes 2163-82 *infra*.

2064. Privacy Act § 3, 5 U.S.C.A. § 552a(k)(1) (Supp. Feb. 1975).

2065. Privacy Act § 3, 5 U.S.C.A. § 552a(k)(4) (Supp. Feb. 1975).

termine individual qualifications for appointment or promotion in the federal service,²⁰⁶⁶ information obtained prior to the effective date of the Privacy Act under either an express or implied promise of confidentiality if release of the information would identify the source,²⁰⁶⁷ information supplied by third parties under an express pledge of confidentiality after the effective date of the Act if disclosure would identify the source,²⁰⁶⁸ and material relating to the subject's health, unless certain "special procedures" are established.²⁰⁶⁹ The first three categories are reasonable: the last three, however, deserve special attention.

An agency may not conceal the existence of information in the fourth category—that obtained from third parties prior to the effective date of the Act—and must characterize it at least in some very general way.²⁰⁷⁰ While the provision purports to recognize the privacy interests of those persons who supplied information under a promise of secrecy prior to the effective date of the Act, the provision fails to protect those interests completely. First, the provision does not require agencies to deny access to this information. Second, the provision only applies to investigatory material compiled for civil²⁰⁷¹ and criminal²⁰⁷² law enforcement purposes, investigatory material compiled for determining suitability for federal employment,²⁰⁷³ evaluation material used to determine potential for promotion in the Armed Services,²⁰⁷⁴ and material held by the CIA.²⁰⁷⁵ While most third-party information collected by the federal government may fall into one of these three categories, the privacy interests of all persons who divulged information under an express or implied promise of confidentiality should be protected.

Under the fifth category, agencies are allowed to withhold the same types of third-party information obtained after the effective

2066. Privacy Act § 3, 5 U.S.C.A. § 552a(k)(6) (Supp. Feb. 1975), allows the exemption of this material when "disclosure . . . would compromise the objectivity or fairness of the testing or examination process." This provision was designed to protect "actual competitive examinations and rating schedules." *Hearings on Access, supra* note 1969, at 290. It should not be interpreted, at it might be if read literally, to allow agencies to prevent access to the results of an individual's psychological tests. *Cf.* text at notes 2081-88 *infra*.

2067. Privacy Act § 3, 5 U.S.C.A. §§ 552a(k)(2), (k)(5), (k)(7) (Supp. Feb. 1975).

2068. Privacy Act § 3, 5 U.S.C.A. §§ 552a(k)(2), (k)(5), (k)(7) (Supp. Feb. 1975).

2069. Privacy Act § 3, 5 U.S.C.A. § 552a(f)(3) (Supp. Feb. 1975).

2070. 120 CONG. REC. H12,244 (daily ed. Dec. 18, 1974).

2071. Privacy Act § 3, 5 U.S.C.A. § 552a(k)(2) (Supp. Feb. 1975).

2072. Privacy Act § 3, 5 U.S.C.A. § 552a(j)(2) (Supp. Feb. 1975). The exemption for criminal law enforcement agencies includes this and other information. *See* text at note 2169 *infra*.

2073. Privacy Act § 3, 5 U.S.C.A. § 552a(k)(5) (Supp. Feb. 1975).

2074. Privacy Act § 3, 5 U.S.C.A. § 552a(k)(7) (Supp. Feb. 1975).

2075. Privacy Act § 3, 5 U.S.C.A. § 552a(j)(1) (Supp. Feb. 1975). All files held by the CIA are exempted. *See* text at notes 2180-82 *infra*.

date of the Act, but only if the third parties were given an express promise of confidentiality. At the hearings on the Privacy Act, agencies emphasized the need to be able to promise confidentiality in order to get candid evaluations of employees²⁰⁷⁶ and evidence or leads in law enforcement investigations.²⁰⁷⁷ But, in light of the resulting infringement of the privacy interests of data subjects, there should be some requirement that pledges of confidentiality be granted only when necessary and only where there is a strong, clearly justified societal interest at stake.²⁰⁷⁸ Criminal- and civil-law enforcement and national security seem to be two such interests. In the two other areas referred to by the Privacy Act, however, the societal interests at stake are arguably less important: representatives of some federal agencies have testified that they do not need the power to give pledges of confidentiality in order to carry out employment-related investigations,²⁰⁷⁹ and it would seem that, absent national security implications, the military could also conduct promotion-related investigations without granting pledges of confidentiality. The reasonableness standard regulating methods of acquisition that was recommended above²⁰⁸⁰ would subsume this whole question by limiting the instances in which information could be collected from confidential sources. This more flexible standard would both better protect the privacy interests of data subjects and aid agencies by allowing them to grant pledges of confidentiality in certain circumstances where they are not currently authorized to do so. It might, for example, allow agencies to withhold information revealing a confidential source where disclosure would endanger the physical safety of the informant.

The sixth category of information exempt from the notice and challenge provisions unnecessarily limits subject access to medical records by allowing an agency to establish "special" procedures for the disclosure to an individual of medical records, including psychological records, pertaining to him. The House report on the Act reveals that this provision was included because of the feeling that the transmission of medical information could have an adverse effect upon an

2076. The statement of the Department of Defense is typical: "It is almost axiomatic to observe that if persons who are interviewed know that the interview will be revealed to the subject of the file, that it would have a chilling effect on their willingness to give a forthright statement of what they know about the subject." *Hearings on Access*, *supra* note 1969, at 240.

2077. *See, e.g., id.* at 149 (statement of M. Lawton, Deputy Assistant Attorney General, Department of Justice).

2078. *Hearings on Access*, *supra* note 1969, at 162 (testimony of T. McFee, Deputy Assistant Secretary, HEW).

2079. *See, e.g., Joint Hearings*, *supra* note 1641, at 466 (testimony of the representative of the FTC).

2080. *See* text following note 2026 *supra*.

individual.²⁰⁸¹ In such a case the House report suggests that the agency could release the information to a doctor named by the requesting individual.²⁰⁸² The report would also allow an agency to adopt other rules to apprise a person of medical information about him. It is unclear what other procedures are envisioned, but the report seems to imply that an individual need not have complete access to his file, even after it is transmitted to his doctor. In certain respects, allowing patients access to their own records seems to be a better policy than selective disclosure. First, nonaccess of patients to their records may prevent the correction of innocent errors.²⁰⁸³ Second, it is rather incongruous to allow doctors to decide what information a patient may have concerning himself, especially where there might be a question of malpractice.²⁰⁸⁴ Third, involving patients in medical record-keeping helps establish good doctor-patient relations and contributes to the quality of health care.²⁰⁸⁵ On the other side, it is urged that records should not be disclosed because they are in technical language that patients cannot understand. But this problem can more easily be remedied by ensuring that patients receive explanations of their records.²⁰⁸⁶ It is also feared that disclosure to a patient that he has a terminal disease may cause him emotional and psychological harm.²⁰⁸⁷ However, the policy that a doctor should decide whether a patient should be informed about his condition is paternalistic. At least one state has codified the patient's right of access to all medical records except those of mental hospitals.²⁰⁸⁸ A similar approach in the Privacy Act would be more consistent with the Act's over-all policy of vesting control in the individual over the flow of information about him. In light of the layman's need for explication of much medical information, the agency should be allowed to insist on disclosure to a doctor designated by the subject, but the doctor should then be required to disclose the entire substance of the records to the subject.

A final concern with respect to the right of access is that the cost of the procedure to the subject not nullify the right. The Privacy Act authorizes agencies to charge fees only for the cost of making copies of the record,²⁰⁸⁹ thereby sparing the subject the potentially large cost of search for and review of records.²⁰⁹⁰ The Act also avoids

2081. H.R. REP. NO. 93-1416, 93d Cong., 2d Sess. 16-17 (1974).

2082. *Id.*

2083. *Joint Hearings, supra* note 1641, at 2243-44 (report of B. Kaiser).

2084. *Id.* at 2244.

2085. *Id.* at 2242.

2086. *Id.*

2087. *See id.* at 2243.

2088. *See* MASS. ANN. LAWS ch. 111, § 70 (1975).

2089. Privacy Act § 3, 5 U.S.C.A. § 552a(f)(5) (Supp. Feb. 1975).

2090. The Director of the Bureau of Manpower Information Systems of the CSC

making the right of access illusory by not *requiring* the data subject to examine his file at the place it is kept. The Senate had advocated that individuals be allowed to receive copies of their files by mail upon written request and with proper identification,²⁰⁹¹ but as enacted the Act only requires each agency "to establish procedures for the disclosure to an individual" of his file.²⁰⁹² Although this provision would seem to allow an agency to use the mails, it unfortunately does not guarantee that data subjects will be able to resort to such a procedure.

Complementing the right of access is the other major provision of the Privacy Act, the right to challenge. Subsection (d)(2) fully incorporates the right of challenge with respect to all records to which the individual has a right of access. Together the rights of access and challenge enable the individual to ensure that the government maintains in its files only relevant and accurate information about him. Further, through challenge of inaccurate or irrelevant information the individual can exercise a deterrent effect on improper acquisition.

Under subsection (d)(2), each agency must, within ten days following receipt, acknowledge an individual's request to amend his record²⁰⁹³ and promptly correct the record or inform the individual of its refusal to do so.²⁰⁹⁴ The agency must also state its reasons for refusing to amend and inform the individual of the procedures established for the review of that refusal.²⁰⁹⁵ If the individual seeks such a review, it must be conducted within thirty days. If after review the agency still refuses to amend the record, it is required to notify the individual of his right to file with the agency a concise statement setting forth his disagreement with the agency,²⁰⁹⁶ and it must inform him of his right to seek judicial review in the federal district courts.²⁰⁹⁷ Subsection (d)(4) requires the agency to note

has stated that the cost for a search of computerized records is \$35 per hour. See *Hearings on Access*, *supra* note 1969, at 306.

2091. See S. REP. NO. 93-1183, *supra* note 1977, at 61.

2092. Privacy Act § 3, 5 U.S.C.A. § 552a(f)(3) (Supp. Feb. 1975).

2093. Privacy Act § 3, 5 U.S.C.A. § 552a(d)(2)(A) (Supp. Feb. 1975).

2094. Privacy Act § 3, 5 U.S.C.A. § 552a(d)(2)(B) (Supp. Feb. 1975).

2095. Privacy Act § 3, 5 U.S.C.A. § 552a(d)(2)(B)(ii) (Supp. Feb. 1975).

2096. Privacy Act § 3, 5 U.S.C.A. § 552a(d)(3) (Supp. Feb. 1975). In hearings on the Privacy Act, the Director of the Bureau of Manpower Information Systems of the CSC stated, "A requirement to accept even a reasonable amount of supplementary material of the individual's choosing for inclusion in the automated systems would result in sharply increased operating costs, and with respect to some of these systems we are planning, could make the systems completely impractical." *Hearings on Access*, *supra* note 1969, at 291. The Act apparently solves this problem by allowing an agency to note the existence of the statement in the computerized file but file the statement itself separately.

2097. Privacy Act § 3, 5 U.S.C.A. § 552a(d)(3) (Supp. Feb. 1975). For a discussion of the judicial review provisions of the Act see text at notes 2129-38 *infra*.

clearly the disputed portions of the record and to provide copies of the individual's statement of disagreement to any person or agency to whom the record is subsequently disclosed. Subsection (c)(4) requires the agency to notify all persons or agencies to whom the disputed record has already been disseminated of the dispute and of the individual's statement of correction. While the statutory scheme is quite comprehensive, it has a few minor deficiencies.

First, until an individual has filed a statement of disagreement, an agency may disseminate challenged information without noting the challenge. Thus, for at least a month, an agency can circulate incorrect information. As there would be little additional administrative burden in noting the initial amendment request in the individual's record, the disseminating agency should be required to do so before releasing the file to other agencies. It does not appear as necessary to require immediate notification of the dispute to prior recipients, in view of the substantial administrative burden entailed in notifying them, and in light of subsection (c)(4)'s requirement that they be notified after the individual has filed a statement of disagreement.

Second, although subsection (c)(4) requires an agency to notify prior agency recipients when it amends a file, it does not require the recipient agencies to amend their files also, as the Senate apparently intended.²⁰⁹⁸ The requirement in subsection (e)(1) that each agency maintain only relevant information may be interpreted to require the recipient agency at least to investigate the accuracy of the information, but this requirement applies only to recipient agencies that are covered by the Act. Rather than burdening the individual with the responsibility of asking each recipient agency whether his record has been amended, it would seem more sensible to require recipient agencies that decide not to amend so to notify the individual.

The Privacy Act also addresses possible threats to privacy posed by agency alteration of information systems. Subsection (o) of the Act requires each agency to provide adequate notice to Congress of any proposal to establish or alter any system of records in order to permit Congress to make an evaluation of the proposal's potential effect on the right of privacy. This provision, in conjunction with the subsection (e)(4) requirement that a description of each existing information system be published in the *Federal Register*,²⁰⁹⁹ should prevent the maintenance of any secret information systems. Subsection (o) was also intended to prevent the creation of data banks without statutory authorization and without proper regard for individual privacy, the confidentiality of data, and the security of the

2098. See S. REP. NO. 93-1183, *supra* note 1977, at 62.

2099. See note 2052 *supra* and accompanying text.

system,²¹⁰⁰ and to prevent the development of a de facto national data bank.²¹⁰¹ This final fear is justified, for while an express proposal for a National Data Bank Center was defeated in the mid-1960's,²¹⁰² the possibility that agencies will consolidate information systems on their own has remained.²¹⁰³ Regardless of the merits of the centralization of information systems,²¹⁰⁴ it should not occur without congressional oversight. Subsection (o) accords Congress the opportunity to give that oversight. Subsection (o)'s main deficiency is that it only requires an agency to report proposals to Congress so that it can evaluate the idea. As it will eventually be necessary to obtain the agency's own views on the proposal, Congress should have required, as the Senate bill proposed,²¹⁰⁵ that each agency evaluate

2100. S. REP. NO. 93-1183, *supra* note 1977, at 64-65.

2101. *Id.* at 64.

2102. Several such recommendations were made. See SUMMARY AND CONCLUSIONS, *supra* note 1515, at 8-9. For a complete discussion of the proposal see Note, 82 HARV. L. REV. 400, *supra* note 1909.

2103. See *Hearings on the Census*, *supra* note 1509, at 181 (testimony of A. Miller, Professor, University of Michigan Law School). See also *Joint Hearings*, *supra* note 1641, at 2252-55.

2104. Advocates of the national data-bank center thought it would: (1) make more data available for researchers; (2) reduce the unit cost of data; (3) enable larger and more effective samples to be taken; (4) facilitate the canvassing of a wider range of variables; (5) reduce duplication in government data collection activities; (6) promote greater standardization of techniques among the agencies; (7) make research efforts easier to verify; and (8) provide a data processing pool for all the information-handling agencies. A. MILLER, *supra* note 1503, at 56-57. See Sawyer & Schechter, *Computers, Privacy and the National Data Center: The Responsibility of Social Scientists*, 23 THE AM. PSYCHOLOGIST 810, 813 (1968). However, the merits of the proposal were never really given fair consideration. Instead, the proposal became a focal point for the fears of a loss of privacy. See, e.g., A. MILLER, *supra*, at 57; Hirsch, *Data Banks: The Punchcard Snoozer*, 205 NATION 369 (1967); Miller, *The National Data Center and Personal Privacy*, ATLANTIC, Nov. 1967, at 53; U.S. NEWS & WORLD REP., May 16, 1966, at 56. Numerous congressional hearings were held, outlining the dangers of consolidation. See SUBCOMM. ON ECONOMIC STATISTICS OF THE JOINT ECONOMIC COMM., 90TH CONG., 1ST SESS., REPORT ON THE COORDINATION AND INTEGRATION OF GOVERNMENT STATISTICAL PROGRAMS (Joint Comm. Print 1967); *Hearings on the Coordination and Integration of Government Statistical Programs Before the Subcomm. on Economic Statistics of the Joint Economic Comm.*, 90th Cong., 1st Sess. (1967); *Hearings on Computer Privacy Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967); *Hearings on the Computer and Invasion of Privacy Before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 2d Sess. (1966). It was feared that even statistical data could be used to injure individuals, that improved capacity for handling data would result in demands for more personal information, that reliance upon computers to make decisions affecting personal affairs would be increased, that individualized output would eventually be permitted, and that the center by its very existence would increase conformity by compelling people to "act for the record." Note, *supra* note 1909, at 411-12. The criticism of the bill was so overwhelming that the National Data Center concept is still not a realistic legislative proposal. SUMMARY AND CONCLUSIONS, *supra* note 1515, at 10.

2105. See S. 3418, § 201(f)(1), 93d Cong., 2d Sess. (1974).

the effect of its proposal in a privacy impact statement and submit that statement along with the proposal.²¹⁰⁶

4. Dissemination

The great number of transfers of personal information pose a grave danger to privacy interests. The Privacy Act deals with this problem by allowing dissemination for "routine" uses, by prohibiting dissemination for "nonroutine" uses without the prior written consent of the subject,²¹⁰⁷ and by requiring that the individual be notified at the time of collection of the routine uses that may be made of the information.²¹⁰⁸ Subsection (a)(7) defines "routine use" as "use . . . for a purpose which is compatible with the purpose for which the information was collected." A further limitation on dissemination is that transferee agencies subject to the Act must meet the subsection (e)(1) requirement that agencies maintain only relevant and necessary information.

The present provisions represent a compromise between the proposal that no records be disclosed outside the collecting agency without the prior consent of the subject,²¹⁰⁹ and the proposal that agencies be free to disclose information to anyone as long as the subject is notified.²¹¹⁰ The former proposal ignored the costly duplication of effort that would be required if individuals chose to prevent all transfers,²¹¹¹ while the latter gave insufficient weight to the right of an individual to control the flow of information about him. As discussed below,²¹¹² the Act made no substantive change in the law regarding the disclosure of personal information.²¹¹³

The scheme adopted by the Privacy Act is subject to attack on the ground that it gives insufficient control to the subject at the time of data acquisition. For example, although each agency must inform the information supplier of the routine uses that may be made of the information, the Act does not recognize a right to withhold information on the basis of the agency's determination of routine uses.

2106. See S. REP. NO. 93-1183, *supra* note 1977, at 64-65.

2107. Privacy Act § 3, 5 U.S.C.A. § 552a(b) (Supp. Feb. 1975).

2108. Privacy Act § 3, 5 U.S.C.A. § 552a(e)(3) (Supp. Feb. 1975). Subsection (e)(4) (D)'s requirement that each agency publish "each routine use of the records contained in the system, including the categories of users and the purpose of such use" provides additional notice.

2109. See H.R. 9527, 92d Cong., 2d Sess. (1972).

2110. See H.R. 12206, 93d Cong., 2d Sess. (1974).

2111. For example, every three months the Social Security Administration transfers the earning records of one million persons to state agencies that administer unemployment programs. If consent for the transfer were required and refused, the states would have to acquire this information on their own. Even a notice requirement would be unreasonably costly, resulting in four million notices a year. See *Hearings on Access*, *supra* note 1969, at 182.

2112. See text at note 2198 *infra*.

2113. See 11 WEEKLY COMP. OF PRES. DOCS. 8 (Jan. 1, 1975).

Instead, the Act envisions that Congress will exercise "a vigorous oversight check on agencies to make certain as much as possible that no 'nonroutine' transfers of records . . . are either hidden or blanketed in under the 'routine' category to nullify the basic protections of the law to individuals."²¹¹⁴ Each agency thus can, absent congressional action, continue to decide the uses for which it can disseminate information it collects;²¹¹⁵ the SEC's Name and Relationship System, for example, can continue routinely to distribute derogatory information to other agencies,²¹¹⁶ and the Civil Service Commission can continue routinely to transmit information on a subject's character, general reputation, personal characteristics, and mode of living to various branches of the government.²¹¹⁷ To be sure, once unnecessary or irrelevant information is transferred to an agency for a routine use, the individual presumably can challenge the retention of that information under subsection (e)(1). Moreover, individuals can trace distributions of their records because of the (c)(3) requirement that agencies make available to the subject accountings of file transfers. These two subsections provide only limited control over the dissemination of information, however, because they apply only after dissemination has occurred and they depend on the subject initiating an inquiry as to whether there have been improper disseminations. To ensure that individuals retain control over the dissemination of surrendered information, the Privacy Act should have required that the individual be able to challenge collection by the collecting agency on the ground that the information sought is irrelevant to or unneeded by an agency that has been labeled a routine recipient.

Subsection (b) allows dissemination of records for nonroutine uses without the prior consent of the individual in a variety of situations where the need for the information is great or the damage to privacy interests is slight.²¹¹⁸ For example, subsection (b)(4) allows

2114. H.R. REP. NO. 93-1416, *supra* note 2081, at 12.

2115. Moreover, Privacy Act, § 3, 5 U.S.C.A. § 552a(e)(11) (Supp. Feb. 1975), allows an agency to publish in the *Federal Register* notice of any new use and provide an opportunity for interested persons to submit arguments. The provision would apparently allow an agency to adopt new "routine uses" for which disclosure could be made without the data subject's consent.

2116. *See* FEDERAL DATA BANKS, *supra* note 1515, at XLIV.

2117. *See id.*

2118. There are ten situations where information may be disseminated for a non-routine use without the prior consent of the individual. Five of these are discussed in the text at notes 2119-23 *infra*. The other five situations seem inoffensive. Subsection (b)(1) allows disclosure of the information to those officers and employees of the agency maintaining the record who need the record to perform their duties. Subsection (b)(6) allows disclosure to the National Archives. This exemption allows an agency to gather information of historical importance. For its legislative origin see *Hearings on Access*, *supra* note 1969, at 274-76. Subsection (b)(8) allows disclosure "to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual." Subsection (b)(9), allowing dissemination to Congress, and

disclosure of records to the Bureau of the Census for purposes of planning because of the strict confidentiality of Census records.²¹¹⁹ Subsection (b)(5) permits disclosure of records in a nonidentifiable form to a recipient for use in statistical research because of the reduced privacy dangers in the transfer of nonidentifiable information and because of the desire to facilitate research.²¹²⁰ Subsection (b)(7) exempts from the consent requirement information sought by an agency for a law enforcement activity, but prevents law enforcement agencies from going on "fishing expeditions" by requiring the head of the requesting agency to specify in writing the particular portion of the record desired and the law enforcement activity for which the record is sought.

Only two of the exemptions are questionable. Subsection (b)(11) allows disclosure without consent "pursuant to the order of a court of competent jurisdiction." The Senate recommended that an agency be required to serve advance notice on the subject before it disseminates his file pursuant to compulsory legal process.²¹²¹ Such a provision is more attractive than the provision adopted because it affords greater protection to the subject's privacy interests by permitting him to take appropriate legal steps to suppress a subpoena²¹²² without unduly burdening the requester, who would already be in court. The difficulties with subsection (b)(2), which permits disclosures required under the FOIA, are dealt with in the discussion on the interaction of the Privacy Act and the FOIA.²¹²³

Subsection (n) of the Privacy Act deals with a narrow dissemination problem that had attracted earlier congressional attention,²¹²⁴ by forbidding the sale or rental by an agency of an individual's name and address unless such action is specifically authorized by law. The provision was a response to the practice of various government agencies of selling mailing lists of persons with certain characteristics, such as gun collectors, amateur radio operators, and licensed pilots, to commercial and political organizations.²¹²⁵ The sale of such lists infringes upon privacy interests not because the individual receives mail, which can easily be thrown away, but because information

subsection (b)(10), allowing dissemination to the Comptroller General, facilitate oversight of the administration of the Act.

2119. Laws relating to the Bureau of the Census limit access to census records to Bureau employees and prohibit their removal from the premises. H.R. REP. NO. 93-1416, *supra* note 2081, at 12-13. See text at notes 1934-35 *supra*.

2120. See also *Hearings on Access*, *supra* note 1969, at 159, 180-81 (remarks of the representative of HEW).

2121. See S. REP. NO. 93-1183, *supra* note 1977, at 66.

2122. See *id.*

2123. See text at notes 2196-214 *infra*.

2124. See generally *Hearings on Mailing Lists*, *supra* note 1499.

2125. See *id.* at 28-29, 70, 136.

about the individual has been disclosed without his knowledge. Although salutary in purpose, subsection (n) may be of limited force because it states explicitly that it shall not be construed to require the withholding of names and addresses otherwise permitted to be made public, and presumably, therefore, permits disclosure under the FOIA.²¹²⁶ Provisions of the FOIA mandating disclosure of information to the public do not apply where disclosure "would constitute a clearly unwarranted invasion of personal privacy."²¹²⁷ This privacy exemption to the FOIA, however, does not as interpreted adequately protect privacy interests.²¹²⁸ In the area of mailing lists, its disabilities are perpetuated in the Privacy Act because of subsection (n).

5. Remedies and Sanctions

The privacy rights created by the Privacy Act would be meaningless if they were not accompanied by effective remedies or sanctions. The Act establishes civil and criminal liability for some violations, but it seems doubtful that such provisions are sufficient to protect all the rights created by the Act.

Subsection (g)(1) of the Privacy Act provides that an individual may bring a civil action against an agency in the federal district courts whenever the agency refuses to amend the individual's record²¹²⁹ or refuses access to a record.²¹³⁰ Thus an individual always has standing to contest an agency's failure to accord him the rights of access and challenge. An individual's standing to contest an agency's failure to maintain his records with accuracy, relevance, timeliness, and completeness, set forth in subsection (g)(1)(C), extends only to situations in which a determination is made that is adverse to the individual. Subsection (g)(1)(C) apparently refers to violations of subsection (e)(5) only, but might also include violations of (e)(1). Because the next subsection states only that it applies to violations of "any other provision,"²¹³¹ it is left unclear whether an individual alleging a violation of (e)(1) must await an adverse determination as required by (g)(1)(C).

With respect to violations of all other primary rights conferred by the Act, subsection (g)(1)(D) grants standing to an individual whenever an agency "fails to comply with any other provision of this section, . . . in such a way as to have an adverse effect on the individual." While the provision presumably does not require an

2126. 120 CONG. REC. H12,244 (daily ed. Dec. 18, 1974).

2127. 5 U.S.C. § 552(b)(6) (1970).

2128. See text at notes 700-44 *supra*.

2129. Privacy Act § 3, 5 U.S.C.A. § 552a(g)(1)(A) (Supp. Feb. 1975).

2130. Privacy Act § 3, 5 U.S.C.A. § 552a(g)(1)(B) (Supp. Feb. 1975).

2131. Privacy Act § 3, 5 U.S.C.A. § 552a(g)(1)(D) (Supp. Feb. 1975).

adverse administrative determination, the ambiguity of the term "adverse effect" leaves unclear what an individual must show to obtain standing. If the adverse effect requirement is only intended to restrict standing to data subjects whose Privacy Act rights are violated (through, for example, improper dissemination or improper collection of information), the subsection would impose only minimal standing requirements. If, however, the adverse effect requirement is intended to restrict standing to individuals who can prove *prima facie* that the agency violation resulted in monetary harm,²¹³² the Act would fail to recognize that there can be serious violations of privacy that do not result in such harm.²¹³³

The argument that the adverse effect requirement allows suit by anyone who is the subject of information acquired or disseminated in violation of the Privacy Act draws support from the Senate report on an analogous provision contained in the Senate bill. Although the phrase "adverse effect" comes from the House bill,²¹³⁴ the Senate version granted standing to any "aggrieved person,"²¹³⁵ a similar formulation. The Senate report explained that the phrase was

designed to encourage the widest possible citizen enforcement through the judicial process. This is necessary, as mentioned, since the Act does not give any administrative body authority to ensure compliance with the Act. The Committee intends the use of the term "aggrieved person" to afford the widest possible standing consistent with the constitutional requirement of "case or controversy" in Article III, Sec. 2 of the Constitution. In this respect, the provision is designed, among other things, to supply certain deficiencies in standing and ripeness which the courts found in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), *Laird v. Tatum*, 408 U.S. 1 (1972), and [*California Bankers Association v. Shultz*, 416 U.S. 21 (1974)].²¹³⁶

The failure of the conference staff's report to comment on any compromise in this regard arguably suggests that the House conferees understood their language to have the same effect. If Congress had intended to require a showing of actual damage in order to obtain standing, it could have used the words "actual damages," as it did in subsection (g)(4)(A), instead of "adverse effect."

There are countervailing indications, however, that the "adverse effect" requirement of subsection (g)(1)(D) was intended to require

2132. Cf. *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (rejecting a challenge to use of the military for domestic surveillance and holding that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . .").

2133. See text at notes 1536-49 *supra*.

2134. See H.R. 16373, § (g)(1)(C), 93d Cong., 2d Sess. (1974).

2135. S. 3418, §§ 303(b), (c), 93d Cong., 2d Sess. (1974).

2136. S. REP. NO. 93-1183, *supra* note 1977, at 83.

a showing of actual harm. This conclusion is supported by the structure of subsection (g)(1). Subsections (g)(1)(A) and (g)(1)(B), providing standing when an agency violates subsections (d)(3) or (d)(1) of the Act, clearly do not require a showing of actual harm. If subsection (g)(1)(D) were meant to give standing to any individual who is affected by any other violations of the Act, there would have been no need to mention specifically violations of (d)(3) and (d)(1) in subsections (g)(1)(A) and (g)(1)(B). Moreover, the wording of subsection (g)(1)(D) comes directly from the language of the House bill,²¹³⁷ which is generally more conservative in its protections of the right of privacy.²¹³⁸

Given these conflicting indications of congressional intent, courts should interpret "adverse effect" broadly, and should not require a showing of actual harm. This interpretation of "adverse effect" is necessary if the Act is to fulfill its stated purpose to "permit an individual to determine what records pertaining to him are . . . disseminated . . ."²¹³⁹ If an individual can only challenge the dissemination of information that causes him monetary harm he is obviously powerless to prevent much improper dissemination.

The Act grants either damages or injunctive relief, depending upon the nature of the agency violation, to individuals with standing to sue. When an agency improperly refuses to amend an individual's record or improperly refuses an individual access to his records, the Act authorizes courts to order the agency to correct the record or to produce the record.²¹⁴⁰ In these situations, the Act makes injunctive relief the exclusive remedy, with no provision for redress of actual damages suffered from wrongful agency refusal to amend. For all other violations of the Act the sole remedy appears to be monetary damages.²¹⁴¹ Damages are not available, however, unless "the agency

2137. See H.R. 16373, § (g)(1)(C), 93d Cong., 2d Sess. (1974).

2138. See the various Senate proposals mentioned at notes 2091, 2121, & 2136 *supra*, and at notes 2145, 2147, 2151, & 2182 *infra*.

2139. Privacy Act § 2(b)(1), 5 U.S.C.A. § 552a (note) (Supp. Feb. 1975).

2140. Privacy Act § 3, 5 U.S.C.A. §§ 552a(g)(2), (g)(3) (Supp. Feb. 1975). Where the violation alleged is refusal to amend, subsection (g)(2)(A) empowers the court to determine the matter de novo. Where the violation alleged is denial of access to a file, subsection (g)(3)(A) empowers the court to determine the matter de novo and to examine in camera the contents of any records claimed to be exempted by subsection (k), discussed in the text at notes 2183-94 *infra*. In an action under either (g)(2) or (g)(3), the court may assess against the United States reasonable attorney fees and other reasonable litigation costs, if the complainant has substantially prevailed. Privacy Act § 3, 5 U.S.C.A. §§ 552a(g)(2)(B), (g)(3)(B) (Supp. Feb. 1975).

2141. Privacy Act § 3, 5 U.S.C.A. § 552a(g)(4) (Supp. Feb. 1975) provides:

In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000; and

acted in a manner which was intentional or willful. . . ."²¹⁴² This standard for recovery of damages is a compromise²¹⁴³ between the House proposal of the traditional "arbitrary and capricious" standard for review of agency action²¹⁴⁴ and the Senate proposal of strict liability for any agency violation of the Act.²¹⁴⁵ The legislative history indicates that "[o]n a continuum between negligence and the very high standard of willful, arbitrary, or capricious conduct, this standard is viewed as only somewhat greater than gross negligence."²¹⁴⁶ This comment suggests that liability should not attach unless the agency's action was so lacking in reason as to approach recklessness. This requirement obviously imposes a heavy burden on a party seeking compensation. As the Act does not explicitly provide for injunctive relief for these violations, a plaintiff who fails to meet this requirement may be without a remedy. For example, a court might find that an agency is improperly disseminating files for non-routine uses without the subjects' consent, and yet be powerless not only to prevent the dissemination but also to grant compensation to the subjects. This interpretation is one courts might well try to avoid, but the Act could have avoided this difficulty either by authorizing injunctive relief with regard to all violations of the Act where appropriate,²¹⁴⁷ or by setting a lower standard for agency liability, or both.

Under the Act, damages are to be recovered from the federal government.²¹⁴⁸ If the offending agency were required to pay, such payments would be reflected in the agency's operating budget and would perhaps provide a more direct deterrent to violations. The \$1000 floor on recovery provided in the Act²¹⁴⁹ presumably represents a compromise between the House proposal, which only allowed recovery of actual damages,²¹⁵⁰ and the Senate proposal, which allowed recovery of punitive damages where appropriate.²¹⁵¹ A provision for punitive damages would seem desirable in order to deter repeated violations of the Act, although in the absence of direct

(B) the costs of the action together with reasonable attorney fees as determined by the court.

2142. Privacy Act § 3, 5 U.S.C.A. § 552a(g)(4) (Supp. Feb. 1975).

2143. 120 CONG. REC. H12,245 (daily ed. Dec. 18, 1975).

2144. H.R. 16373, § (g)(3), 93d Cong., 2d Sess. (1974).

2145. S. 3418, § 303(c), 93d Cong., 2d Sess. (1974).

2146. 120 CONG. REC. H12,245 (daily ed. Dec. 18, 1974).

2147. S. 3418, § 303(b), 93 Cong., 2d Sess. (1974), would have so provided.

2148. Privacy Act § 3, 5 U.S.C.A. § 552a(g)(4) (Supp. Feb. 1975), set out in note 2141 *supra*.

2149. Privacy Act § 3, 5 U.S.C.A. § 552a(g)(4)(A) (Supp. Feb. 1975).

2150. See H.R. 16373, § (g)(3)(A), 93d Cong., 2d Sess. (1974).

2151. See S. 3418, § 303(c)(2), 93d Cong., 2d Sess. (1974).

recovery from the offending agency, the effectiveness of such deterrence is certainly questionable.

In sum, the Privacy Act allows a data subject to enforce his rights of access and challenge through injunctive relief, and provides him with an opportunity to collect damages for the "intentional or willful" retention of inaccurate or irrelevant information once an agency has made a determination adverse to his interests. Thus, the Act provides relatively full protections against violations of privacy that occur in the retention stage. With respect to the acquisition and dissemination stages, however, the remedies provided by the Act are clearly unsatisfactory. Only damages are available, and to obtain them the plaintiff must show that the agency acted intentionally and willfully, and may have to show actual harm. The weakness of the remedy provisions prevents the accomplishment of the Act's purpose to "permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated" ²¹⁵² To accomplish this purpose, the Act should have given standing to anyone who is the subject of information involved in a violation of the Privacy Act and should have provided for actual damages, punitive damages, and injunctive relief, wherever appropriate, as the Senate bill had proposed. ²¹⁵³

For violations of provisions that are "key to any effective protection for privacy and confidentiality," ²¹⁵⁴ the Act provides criminal fines of up to \$5000. Because "[t]he entire Act would be frustrated if secret data banks could be created and operated with impunity," ²¹⁵⁵ subsection (i)(2) imposes a fine on "[a]ny officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of [publishing in the *Federal Register*]" In response to the equally fundamental need to guard against willful disregard of the limitations on dissemination, ²¹⁵⁶ subsection (i)(1) imposes fines on any officer or employee of an agency "who knowing that disclosure of the specific material is . . . prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it" Finally, subsection (i)(3) makes "[a]ny person who knowing and willfully requests or obtains any record concerning an individual from an agency under false pretenses . . ." subject to a fine. None of the civil remedies in the Act would reach individuals guilty of such violations. At least one other critical provision of the Act probably should have been

2152. Privacy Act § 2(b)(1), 5 U.S.C.A. § 552a (note) (Supp. Feb. 1975).

2153. S. 3418, §§ 303(b), (c), 93d Cong., 2d Sess. (1974).

2154. S. REP. NO. 93-1183, *supra* note 1977, at 81.

2155. *Id.*

2156. *Id.*

reinforced by criminal penalties. Because all of the rights granted by the Privacy Act depend on an individual's ability to find out if an agency maintains a file on him, the Act should have imposed criminal liability on any officer or employee of an agency who, in response to an individual's inquiry about the existence of a file, knowingly responds falsely.

As an aid in enforcing and administering the Privacy Act, the establishment of a federal privacy board was recommended.²¹⁵⁷ As enacted, however, the Privacy Act envisions that disputes arising under it will be settled in the federal courts, and delegates to the agencies themselves the task of promulgating regulations governing the administration of the Act.²¹⁵⁸ A federal privacy board has definite advantages, for it could reduce the case-load burden of the district courts, promote uniformity by promulgating regulations implementing the Act for all agencies,²¹⁵⁹ and reduce the possibility of infractions of the Privacy Act by conducting on-site audits of agency information systems and files.²¹⁶⁰ The board also could be charged with the administration of the FOIA, thereby providing oversight of the interaction between the Privacy Act and the FOIA. Apparently the privacy board proposal failed because Congress was reluctant to establish yet another federal bureaucracy,²¹⁶¹ and because the administrative costs would have been great. Instead, the Privacy Act establishes a Privacy Protection Study Commission, empowered merely to study agency information practices and to recommend changes in the Privacy Act.²¹⁶²

6. Exemptions

The two exemptions to the several provisions of the Privacy Act are, in general, necessary and reasonably circumscribed. Subsection (j)(2) allows criminal law enforcement agencies to exempt certain types of records that they maintain from the provisions granting the rights of subject notice, access, and challenge,²¹⁶³ restricting the

2157. Representative Koch, who introduced the first privacy bill, favored creation of a Federal Privacy Board. *See* 120 CONG. REC. H12,248 (daily ed. Dec. 18, 1974). S. 3418, §§ 101-07, 93d Cong., 2d Sess. (1974), incorporated the idea, but H.R. 16373, 93d Cong., 2d Sess. (1974), did not establish any type of board to oversee administration of the Act.

2158. Privacy Act § 3, 5 U.S.C.A. § 552a(f) (Supp. Feb. 1975), requires each agency to establish procedures governing notice, access, and challenge.

2159. S. 3418, § 103(a)(3), 93d Cong., 2d Sess. (1974), gave the board authority to "develop model guidelines" and "assist Federal agencies in preparing regulations."

2160. This power was explicitly given to the board in the original version of S. 3418, introduced on May 1, 1974. The version reported from committee and passed by the Senate, however, gave the board the power to conduct "inspections." S. 3418, § 103(a)(3), 93d Cong., 2d Sess. (1974).

2161. *See, e.g., Hearings on Access, supra* note 1969, at 195.

2162. Privacy Act § 5, 5 U.S.C.A. § 552a (note) (Supp. Feb. 1975).

2163. Privacy Act § 3, 5 U.S.C.A. § 552a(d) (Supp. Feb. 1975), discussed in the text

acquisition of data²¹⁶⁴ and the method of acquisition,²¹⁶⁵ requiring accuracy of retained information,²¹⁶⁶ imposing civil liability,²¹⁶⁷ and requiring notice to Congress of any alteration of its system of records.²¹⁶⁸ The types of records that may be exempted consist of:

(A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.²¹⁶⁹

This list seems to encompass all records held for criminal law enforcement purposes. The exemption thus reflects a decision to leave the regulation of these records to separate legislation,²¹⁷⁰ and reveals a general fear of hampering criminal investigations²¹⁷¹ by disclosing investigatory techniques²¹⁷² or by discouraging the cooperation of informants.²¹⁷³

In general, this law enforcement records exemption is reasonable. The exemption from restrictions on the type of information that may be acquired seems necessary because of the difficulty in deter-

at notes 2055-98 *supra*. These agencies can also exempt themselves from subsections (e)(4)(G)-(I), which require publication of the procedures for notice and access, and from subsection (h), which requires each agency to establish procedures for subject notice, access, and challenge.

2164. Privacy Act § 3, 5 U.S.C.A. § 552a(e)(1) (Supp. Feb. 1975), discussed in the text at notes 1987-2003 *supra*.

2165. Privacy Act § 3, 5 U.S.C.A. § 552a(e)(2) (Supp. Feb. 1975), discussed in the text at notes 2020-26 *supra*.

2166. Privacy Act § 3, 5 U.S.C.A. § 552a(e)(5) (Supp. Feb. 1975).

2167. Privacy Act § 3, 5 U.S.C.A. § 552a(g) (Supp. Feb. 1975), discussed in the text at notes 2129-53 *supra*.

2168. Privacy Act § 3, 5 U.S.C.A. § 552a(o) (Supp. Feb. 1975), discussed in the text at notes 2099-106 *supra*.

It is possible that the exemption from subsection (o) is an oversight. The exemptions for agencies appear in subsections (j) and (k). No reference is made in these subsections to any other provision following subsection (k), most of which are relatively minor. However, the failure to deal with these later provisions means that the CIA and criminal law enforcement agencies can exempt themselves from the restrictions on the sale of mailing lists, *see* text at notes 2124-28 *supra*, and the development of new information systems. *See* text at note 2179 *infra*.

2169. Privacy Act § 3, 5 U.S.C.A. § 552a(j)(2) (Supp. Feb. 1975).

2170. *See* H.R. REP. NO. 93-1416, *supra* note 2081, at 18.

2171. *See Hearings on Records, supra* note 1517, at 88-90 (Department of Justice), 110 (Department of Defense).

2172. *Id.* at 89-90 (Department of Justice).

2173. *Id.*

mining what will be relevant to a criminal investigation; the exemption from the restrictions on method of acquisition is necessary because collection directly from the individual is generally inconsistent with the nature of criminal investigations. If the broader "reasonableness" standard for acquisition methods proposed above²¹⁷⁴ is adopted, however, a separate exemption would not be necessary because the standard takes into account the legitimacy and weight of agency needs and purposes. The exemption from the requirement that information used in a determination about an individual be accurate seems solidly grounded because the requirement's purpose, "to assure fairness to the individual in the determination,"²¹⁷⁵ is adequately guaranteed by the rules of procedure in a criminal trial.

There are, however, several respects in which the law enforcement records exemption is unduly broad. The first area in which narrowing is feasible is the area of subject access. The Senate bill had exempted from the right of subject access only information in the hands of criminal enforcement agencies that, if disclosed to the subject, would impede current law enforcement proceedings.²¹⁷⁶ Recent amendments to the FOIA have replaced an exemption similar to the Privacy Act's subsection (j)(2)(B) with an exemption allowing nondisclosure only where disclosure would interfere with law enforcement proceedings, deprive a person of his right to a fair trial, constitute an unwarranted invasion of privacy, disclose the identity of confidential sources who are protected by the provisions of the Act, disclose investigate techniques or procedures, or threaten the life or physical safety of law enforcement personnel.²¹⁷⁷ It is curious that Congress found it necessary to enact a broad provision in the Privacy Act when it had been satisfied with a more tailored exemption to the FOIA. Also, there seems to be no reason to exempt criminal law enforcement agencies from civil liability for violations of the few provisions that do apply to them. While criminal penalties remain applicable to violations of many of those provisions, they do not compensate the aggrieved individual. Improper disclosure of investigatory material to employers, for example, could seriously harm innocent individuals.²¹⁷⁸ Finally, the exemption to the requirement that Congress be notified of any alteration in the agency's system of records seems inexplicable, especially in light of the recent

2174. See text following note 2026 *supra*.

2175. Privacy Act § 3, 5 U.S.C.A. § 552a(e)(5) (Supp. Feb. 1975).

2176. S. 3418, § 203(b), 93d Cong., 2d Sess. (1974).

2177. 5 U.S.C.A. § 552(b)(7) (Supp. Feb. 1975). See text at notes 745-828 *supra*.

2178. The ACLU presented a number of examples of individuals who lost jobs or were subjected to police harassment because of the dissemination of arrest records or intelligence information. *Hearings on Criminal Justice Data Banks, supra* note 1550, at 252-59.

congressional concern over proposed consolidation of criminal information systems.²¹⁷⁹

Subsection (j) also allows the CIA to exempt any of its records from the same provisions. The purpose of the exemption appears to be the protection of national security interests.²¹⁸⁰ Yet the Act already contains a narrower exemption for classified documents,²¹⁸¹ and there seems to be no reason to exempt all CIA records, since a blanket exemption would undoubtedly protect many records without any national security significance.²¹⁸²

A narrower exemption in subsection (k) authorizes any agency to exempt certain specific records from the provisions dealing with subject notice, access, and challenge²¹⁸³ and from those concerning acquisition of data.²¹⁸⁴ The subsection covers classified documents,²¹⁸⁵ investigatory material compiled for civil law enforcement purposes,²¹⁸⁶ Secret Service files,²¹⁸⁷ testing or examination material con-

2179. See *id. passim*. The FBI has consolidated files on over 20 million individuals and computerized records on over 450,000 persons. *Id.* at 17. There are no formal regulations concerning distribution of these records. *Id.* at 18-19. The FBI currently has limited programs for sharing criminal information, *id.* at 10, and because of the growing concern over organized crime, with its interstate ramifications, there has been more and more pressure to consolidate investigative records. *Id.* at 18.

2180. See H.R. REP. NO. 93-1416, *supra* note 2081, at 18.

2181. See text at note 2185 *infra*.

2182. The Senate had proposed a narrower exemption because "[m]any personnel files and other systems may not be subject to security classification or may not cause damage to the national defense or foreign policy simply by permitting the subjects of such files to inspect them and seek changes in their contents under this Act." S. REP. NO. 93-1183, *supra* note 1977, at 74.

2183. Privacy Act § 3, 5 U.S.C.A. §§ 552a(d), (c)(3), (c)(4)(G), (H), (I), (F) (Supp. Feb. 1975).

2184. Privacy Act § 3, 5 U.S.C.A. § 552a(e)(1) (Supp. Feb. 1975).

2185. Privacy Act § 3, 5 U.S.C.A. § 552a(k)(1) (Supp. Feb. 1975), exempts records "subject to the provisions of section 552(b)(1) of this title." See text at notes 506-35 *supra*.

2186. Privacy Act § 3, 5 U.S.C.A. § 552a(k)(2) (Supp. Feb. 1975) exempts:

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however*, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

Representative Koch had argued that no exemption was needed for civil law enforcement agencies. 120 CONG. REC. H12,248 (daily ed. Dec. 18, 1974). Two factors may differentiate criminal law enforcement agencies. First, the prevention of crime is usually thought to be a more fundamental societal goal. Second, suspected criminals are protected from deprivations of benefits by stricter constitutional guarantees. Yet, a representative of the FTC testified that failure to protect its files from access would "wreak havoc on their ability to enforce their . . . statutes." *Hearings on Access, supra* note 1969, at 266-67.

cerning federal employment,²¹⁸⁸ and information that would reveal the identity of an informant where such information was obtained in order to determine suitability or eligibility for federal employment, military service, federal contracts, for access to classified information,²¹⁸⁹ or for promotion in the armed services.²¹⁹⁰

Subsection (k) also exempts records "required by statute to be maintained and used solely as statistical records."²¹⁹¹ Subsection (a)(6) defines a "statistical record" as "a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13." This last clause accommodates Census Bureau records.²¹⁹² The exemption from the subject notice, access, and challenge provisions is reasonable because access and challenge would frustrate the timely production and dissemination of data. The exemption from restrictions on data acquisition, however, is unwise, for the result is to leave unregulated the types of irrelevant questions for which the census and other federal questionnaires have been criticized²¹⁹³ and to overlook the dangers to privacy from unrestrained acquisition of data.²¹⁹⁴

To prevent the exemptions from swallowing the Privacy Act in practice, subsection (p) provides that the President shall submit to Congress an annual report "listing for each Federal agency the number of records . . . exempted from the application of [the Privacy Act] under the provisions of subsections (j) and (k). . . ." Congress recently added a similar provision to the FOIA to facilitate congressional oversight of the exemptions to that Act.²¹⁹⁵

7. *Interaction Between the FOIA and the Privacy Act*

It is obvious that the public's right to know about government conduct, guaranteed by the FOIA, will sometimes collide with the equally important right guaranteed by the Privacy Act to control the flow of personal information. The balancing of interests required to resolve this conflict was undertaken in the FOIA rather than in the Privacy Act. The FOIA provides flexible exemptions from its disclosure requirements, especially exemption (b)(6), which protects information the disclosure of which would constitute a clearly

2187. Privacy Act § 3, 5 U.S.C.A. § 552a(k)(3) (Supp. Feb. 1975).

2188. Privacy Act § 3, 5 U.S.C.A. § 552a(k)(6) (Supp. Feb. 1975).

2189. Privacy Act § 3, 5 U.S.C.A. § 552a(k)(5) (Supp. Feb. 1975).

2190. Privacy Act § 3, 5 U.S.C.A. § 552a(k)(7) (Supp. Feb. 1975).

2191. Privacy Act § 3, 5 U.S.C.A. § 552a(k)(4) (Supp. Feb. 1975).

2192. See text at note 1934 *supra*.

2193. See text at notes 1990-93 *supra*.

2194. See text at notes 1536-49 *supra*.

2195. See text at notes 939-42 *supra*.

unwarranted invasion of personal privacy.²¹⁹⁶ These exemptions necessitate a balancing of conflicting interests and envision the dissemination to third parties of some types of information but not of other types. The Privacy Act, on the other hand, adopts a blanket approach that confers on the data subject control over the dissemination of all records (with certain rigid exceptions) without reference to the nature of the information they contain.²¹⁹⁷ In particular, the Privacy Act contains four provisions that together purport to exempt disclosures that are required under the FOIA from all of the dissemination restrictions in the Privacy Act. The intention, as indicated in the legislative history of the Privacy Act, was "to preserve the status quo as interpreted by the courts regarding the disclosure of personal information under [the FOIA]."²¹⁹⁸ The result, therefore, is that disclosure decisions are made under the FOIA rather than under the Privacy Act.

Subsection (b)(2) of the Privacy Act exempts agencies disclosing information under the FOIA from the obligation to obtain the data subject's written consent prior to dissemination. This exemption seems reasonable because it prevents individuals from frustrating legitimate FOIA requests. In order to facilitate data subject challenges to FOIA requests through reverse FOIA suits,²¹⁹⁹ however, the Privacy Act should have required that an individual be notified when an FOIA request is made for his file. Without such a notification requirement, the Act accords too little protection to privacy because agencies cannot be depended on to assert individual privacy interests vigorously. Subsection (c)(1) of the Privacy Act similarly exempts FOIA disclosures from the requirement that each agency keep accountings of the disseminations of each file. While it is possible that disclosure of the identities of FOIA requesters to data subjects might discourage some FOIA requests, that danger seems too remote to outweigh the subject's privacy interest in knowing how information about him is being disseminated.

Subsection (e)(6) of the Privacy Act exempts FOIA disclosures from its requirement that an agency make reasonable efforts to assure the accuracy of an individual file prior to dissemination. This exception does not change the procedures under the FOIA, which itself does not require that an agency disclose only accurate files. As the FOIA is intended to enable citizens to monitor the workings of government,²²⁰⁰ such a requirement within the FOIA would be sub-

2196. See generally text at notes 700-44 *supra*.

2197. The Privacy Act drew its exemptions very specifically. No "balancing" decisions must be made to decide if a record is exempted. Cf. text at notes 496-500 *supra*.

2198. 120 CONG. REC. H12,244 (daily ed. Dec. 18, 1974).

2199. See text at notes 1132-67 *supra*.

2200. See text at note 2096 *supra*.

ject to attack on the ground that it would enable agencies to prevent citizens from discovering that improper information is being collected and maintained. This exemption in the Privacy Act should not present any serious dangers to privacy because of the protection provided by exemption six of the FOIA. The Privacy Act exemption perpetuates, however, the deficiencies, discussed above,²²⁰¹ associated with FOIA exemption six.

In the area of subject access, the interaction of the FOIA and the Privacy Act is delicate. In addition to the right of subject access contained in the Privacy Act, the principle underlying the FOIA of maximizing disclosure of agency records could provide a right of subject access in some situations, although the FOIA has not been so used in most of the litigation to date.²²⁰² There are limitations in both acts, however, on the right of subject access, and an agency desiring to avoid disclosure may well try to use the limitations in one act to bar subject access under both. Subsection (q) of the Privacy Act states that the FOIA exemptions may not be used to block subject access under the Privacy Act. The applicability of the Privacy Act subject access limitations to the FOIA, however, is dealt with only indirectly by subsection (b)(3) of the FOIA, which allows nondisclosure of information "specifically exempted from disclosure by statute."²²⁰³ The question then is whether information exempted from subject access under the Privacy Act is "specifically exempted from disclosure" within the meaning of FOIA subsection (b)(3).

The Privacy Act exemptions, despite their grant of discretion to the heads of certain agencies to exempt certain records,²²⁰⁴ are probably sufficiently specific to satisfy the terms of (b)(3).²²⁰⁵ There are, however, two convincing arguments that (b)(3) does not incorporate the limitations on subject access contained in the Privacy Act. First, the Privacy Act does not literally require that certain records be kept confidential from the subject. Instead, it merely exempts certain records from its own subject access requirements. Although the Privacy Act does not contain an express provision authorizing subject access where specifically authorized by another statute, the Privacy Act should probably be so interpreted in light of its apparent policy in favor of subject access.

Second, if (b)(3) incorporates into the FOIA the Privacy Act limitations on subject access, then it must also incorporate all of the

2201. See text at notes 700-44 *supra*.

2202. *But see* Koch v. Department of Justice, 376 F. Supp. 313 (D.D.C. 1974), where the plaintiff was denied disclosure of FBI files concerning him. Representative Koch, the losing plaintiff there, was one of the leading sponsors of the Privacy Act. See 120 CONG. REC. H12,248 (daily ed. Dec. 18, 1974).

2203. 5 U.S.C. § 552(b)(3) (1970).

2204. Privacy Act § 3, 5 U.S.C.A. §§ 552a(j), (k) (Supp. Feb. 1975).

2205. See text at notes 568-610 *supra*.

disclosure limitations of the Privacy Act. This result flows from subsection (a)(3) of the FOIA, which has been interpreted to require that disclosures under the FOIA be made without reference to the identity of the requester.²²⁰⁶ Information withheld from the data subject under the Privacy Act, therefore, could be withheld under (b)(3) from all requesters under the FOIA. An interpretation of (a)(3) to allow the withholding of information, under subsection (b)(3), from the data subject alone, would lead to the nonsensical result that data subjects would be barred from access to information available under the FOIA to third parties. Incorporation of the Privacy Act subject access limitations into the FOIA, via subsection (b)(3), would thus lead to the conclusion that despite its apparent intention not to alter the FOIA,²²⁰⁷ Congress in effect amended the FOIA exemptions to be at least as broad as the Privacy Act exemptions. The result would be that all CIA files, for example, even if unclassified, would be exempted from the FOIA, as well as virtually all criminal investigatory files, despite the recent amendments narrowing subsection (b)(7) of the FOIA.

If the disclosure limitations of the Privacy Act are not incorporated into the FOIA via subsection (b)(3), data subjects could try to obtain access to their files under the FOIA wherever the FOIA exemptions are narrower than those in the Privacy Act, as they are with respect to criminal investigatory files. There are still several other obstacles, however, to subject access under the FOIA. For example, an agency might assert the (b)(6) exemption to the extent information in the file concerns the subject's private affairs. The subject should be able to overcome that obstacle with the very sensible argument that disclosure to him of information concerning his own private affairs would certainly not violate his privacy. This argument, however, violates the rule against taking into consideration the identity of the particular requester in applying the FOIA exemptions.²²⁰⁸ Further, subject access might arguably constitute a waiver by the data subject of his right of privacy. Rejection of these formalistic arguments would be consistent with the proposal made above to employ balancing in deciding whether to release material covered by the (b)(6) exemption to the FOIA.²²⁰⁹ Similar arguments could be used to circumvent the FOIA (b)(4) exemption for financial information,²²¹⁰ if it were employed to block subject access. One legitimate justification, however, for an agency denial of

2206. See note 458 *supra* and accompanying text.

2207. See text at note 2198 *supra*.

2208. See note 458 *supra* and accompanying text. In FOIA exemption six cases the courts have sometimes considered the identity and interests of the requester. See text at notes 716-34 *supra*.

2209. See text at notes 741-44 *supra*.

2210. 5 U.S.C. § 552(b)(4) (1970). See text at notes 611-47 *supra*.

subject access under the FOIA is the (b)(5) exemption for inter- and intra-agency memoranda.²²¹¹

The potential obstacles to subject access under the FOIA show that the Privacy Act's right of subject access—where applicable—improves the protection of privacy interests. With respect to the other privacy interests, such as being notified that a file is maintained, being able to challenge inaccurate or irrelevant information in one's file, and having control over inter-agency dissemination of the file, the Privacy Act, despite its deficiencies—especially its failure to control adequately inter-agency dissemination,²²¹² its insufficient remedies to enforce the rights it creates,²²¹³ and its overbroad exemptions²²¹⁴—clearly represents a major step toward satisfactory safeguards for individual privacy. There is need, however, for a clarification of the interaction of the Privacy Act and the FOIA. The best method of resolving current ambiguities would probably be to delineate within the Privacy Act the full scope of the right of subject access, and to make clear that the Privacy Act exemptions do not apply to the FOIA. The FOIA and Privacy Act exemptions need not be made uniform in all respects, but Congress should reexamine the exemptions in both acts to ensure that in no instance can a third party obtain access to a file under the FOIA where the Privacy Act denies access to the subject.

2211. 5 U.S.C. § 552(b)(5) (1970). *See* text at notes 648-99 *supra*. This exemption was used to deny access in *Koch v. Department of Justice*, 376 F. Supp. 313, 316 (D.D.C. 1974).

2212. *See* text at notes 2107-28 *supra*.

2213. *See* text at notes 2129-62 *supra*.

2214. *See* text at notes 2163-95 *supra*.